

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

APRIL TERM, 1903.

No. 1287.

207

PRIMO FONTANO, APPELLANT.

v's.

MARY HELEN CARROLL ROBBINS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED MARCH 10, 1903.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1903.

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

PRIMO FONTANO, Appellant,
vs.
MARY HELEN CARROLL ROBBINS. } No. 1287.

a Supreme Court of the District of Columbia.

PRIMO FONTANO, Plaintiff,
vs.
MARY HELEN CARROLL ROBBINS, Defendant. } No. 42237. At Law.

UNITED STATES OF AMERICA, } ss:
District of Columbia,

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Declaration.*

Filed June 13, 1893.

In the Supreme Court of the District of Columbia, the 13th Day of June, 1898.

PRIMO FONTANO
vs.
MARY HELEN CARROLL ROBBINS. } Law. No. 42237.

The plaintiff sues the defendant for that heretofore to wit: on the 19th day of August 1895, at Washington city, in the District of Columbia, by a certain agreement then and there made, one part of which sealed with the seal of said defendant the plaintiff now brings here into court, the date whereof is the same day and year aforesaid, by which agreement the plaintiff did covenant and agree with the defendant in consideration of the fulfillment of the agreement above mentioned made by the defendant while unmarried, and in her maiden name of Mary Helen Carroll, as follows:

Article 1. The contractor under the direction and to the satisfaction of Heins and La Farge, architects, shall and will provide all the materials and perform all the work mentioned in the specifications and shown on the drawings prepared by said architect- for the

interior marble finish of the chapel of Saint Anthony of Padua, in the church of Saint Matthew, Washington, D. C., including the ceiling of decorative plaster-work and the three windows of transparent alabaster, all set up in place complete, which drawings and specifications are identified by the signatures of the parties hereto.

2 It was further agreed :

Article 3. That no alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the architects, and when so made, the value of the work added or *admitted* shall be computed by the architects, and the amount so ascertained shall be added to or deducted from the contract price. In the case of dissent from such award by either party hereto, the valuation of the work added or omitted shall be referred to three (3) disinterested arbitrators, one to be appointed by each of the parties to this contract, and the third by the two thus chosen ; the decision of any two of whom shall be final and binding, and each of the parties hereto shall pay one-half of the expense of such reference.

It was further provided in said agreement :

Article 6. That the plaintiff should complete the several portions and the whole of the work comprehended in said agreement by and at the time or times hereinafter stated, namely, on or before the first day of October A. D. 1896.

It was further provided in said agreement :

Article 8. That the defendant should provide all labor and materials not included in said contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the plaintiff, agrees that she will reimburse him for such loss ; and the plaintiff agreed that if he shall delay the material progress of the work so as to cause any damage for which the defendant shall become liable (as above stated), then he shall make good to her any such damage. The amount of such loss or damage to either party hereto shall, in every

3 case, be fixed and determined by the architects or by arbitration, as provided in art. III of this contract.

It was further provided in said contract :

Article 9. That the sum to be paid by the defendant to the plaintiff for said work and materials should be \$28,500.

And the plaintiff avers that he has completely performed his part of said agreement and that his work and materials have been accepted and that the final payment has been made to him after the acceptance of said work and materials and that the same has been received by the defendant as satisfactory in every respect.

The plaintiff further avers that he was ready to commence setting the marble in said chapel on the 10th day of June, 1897, at which time he came to Washington, D. C., for that purpose, and brought a skilled laborer with him to aid in setting the marble and he further avers that had the chapel been in readiness for setting the marble he could and would have completed his contract in the space of three months.

The plaintiff further avers that when he arrived in Washington with his material and workmen, to wit, on the 10th day of June, 1897, said chapel had not been roofed in nor had the walls been built up to their full height and in consequence it was then impossible to place in position the marble-work called for under said contract; and that he has been delayed waiting for said chapel to be put up in accordance with the terms of said contract 150 days to the damage of the plaintiff to the amount of \$3,888.10 as per bill of particulars hereto attached, and the defendant, having by the plaintiff been requested to pay the same, has declared that she is
 4 entirely without liability in regard to said claim and declines to pay the same, wherefore the plaintiff claims judgment for the amount of said claim with interest from the 13th day of June 1898, besides full costs of suit.

O. D. BARRETT,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

O. D. BARRETT,
Attorney for Plaintiff.

5 *Bill of Particulars.*

Mrs. Mary Helen Carroll Robbins, *née* Carroll, to Primo Fontano,
 Dr.

1898.

May 23.	To time lost while waiting for the chapel of St. Matthew's church to be put in readiness so that the marble-work in said chapel could be put up in accordance with the terms of the contract between said Fontano and said Mrs. Robbins, 150 days, at \$15 per day.....	\$2,250.00
May 23.	To cash paid workman, C. Zambelli, during the above-mentioned time in which he could not go on with his work, 150 days at \$4 per day...	600.00
	To cash paid for extra storage at custom-house on marble while waiting for chapel to be put in readiness for interior work.....	339.10
	To cash paid for extra cartage in hauling marble second time.....	144.00
	To interest for six months on delayed payment of \$18,500.....	555.00
	Total.....	<u>\$3,888.10</u>

Defendant's Plea.

Filed July 7, 1893.

In the Supreme Court of the District of Columbia.

PRIMO FONTANO	}	At Law. No. 42237.
<i>vs.</i>		
MARY HELEN CARROLL ROBBINS.		

Now comes the defendant in the above-entitled cause, and for plea to the declaration filed therein, says that she demands oyer of the sealed writing in said declaration mentioned, and the same having been exhibited to her she says that in all respects she performed all the conditions and obligations assumed by her to be performed in said writing obligatory, and she says that she provided all labor and materials agreed by her to be provided upon the building referred to in said declaration, in such manner as not to delay the material progress of the work agreed to be performed by the plaintiff, and that she fully paid the plaintiff for all the work done by him under his contract with her, and this the defendant is ready to verify.

HAMILTON & COLBERT,
Attorneys for Defendant.

Amendments to Declaration.

Filed July 22, 1898.

In the Supreme Court of the District of Columbia, the 20th Day of July, 1898.

PRIMO FONTANO	}	Law. No. 42237.
<i>vs.</i>		
MARY HELEN CARROLL ROBBINS.		

The plaintiff amends his declaration and bill of particulars in the above-entitled cause as follows:

1. By striking out the word "he" between the words "time" and "came" in the third line of the next to the last paragraph, and inserting in its place the words "his brother."

2. By striking out the word "he" between the words "when" and "arrived" in the first line of the last paragraph of the declaration, and inserting in its place the words "his brother."

3. By inserting after the word "time" in the first line of the first item of the bill of particulars the words "of plaintiff's agent, Coriolano Fontano."

4. By striking out of the line next to the last of the first item of

the bill of particulars the words "said Fontano" and inserting the words "the plaintiff."

O. D. BARRETT,
Attorney for Plaintiff.

Endorsed: We consent to the filing of the within amendment.
Hamilton & Colbert, attorneys for defendant.

8

Joinder in Issue, &c.

Filed July 22, 1898.

In the Supreme Court of the District of Columbia, the 22nd Day of
July, 1898.

PRIMO FONTANO	}	Law. No. 42237.
vs.		
MARY HELEN CARROLL ROBBINS.		

The plaintiff joins issue upon the defendant's plea.

O. D. BARRETT,
Attorney for Plaintiff.

Take notice that the issue joined in the above-entitled cause will
be tried at the next term of this court.

O. D. BARRETT,
Attorney for Plaintiff.

To Messrs. Hamilton & Colbert, attorneys for defendant.

Memorandum.

November 4, 1902.—Verdict for defendant.

9

Supreme Court of the District of Columbia.

FRIDAY, November 21, 1902.

Session resumed pursuant to adjournment, Chief Justice Bingham, presiding.

* * * * *

PRIMO FONTANO, Plaintiff,	}	At Law. No. 42237.
vs.		
MARY HELEN CARROLL ROBBINS, Defendant.		

After argument of the motion for a new trial herein, it is submitted to the court for consideration.

10

Supreme Court of the District of Columbia.

TUESDAY, *December* 16, 1902.

Session resumed pursuant to adjournment, Chief Justice Bingham, presiding.

* * * * *

PRIMO FONTANO, Plaintiff,
vs.
MARY HELEN CARROLL ROBBINS, Defendant. } At Law. No. 42237.

After due consideration of the plaintiff's motion for a new trial, it is considered that said motion be, and hereby is, overruled, and judgment on verdict ordered: Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff her costs of suit to be taxed by the clerk, and have execution thereof.

The plaintiff notes an appeal to the Court of Appeals, and the bond for costs on said appeal is fixed in the penalty of one hundred dollars.

Memorandum.

December 19, 1902.—Appeal bond filed.

11

Memorandum.

January 5, 1903.—Term prolonged 38 days to settle bill of exceptions.

Supreme Court of the District of Columbia, January 30, 1903.

PRIMO FONTANO, Plaintiff,
vs.
MARY HELEN CARROLL ROBBINS, Defendant. } At Law. No. 42237.

Now again comes here the plaintiff by his attorneys and tenders to the court here his bill of exceptions taken during the trial, and prays that the same may be duly signed, sealed, and made part of the record, now for then, which is done accordingly.

12

Bill of Exceptions.

Filed January 30, 1903.

In the Supreme Court of the District of Columbia.

PRIMO FONTANA	}	At Law. No. 42237.
<i>vs.</i>		
MARY HELEN CARROLL ROBBINS.		

Bill of exceptions.

Be it remembered that on the 30th day of October, 1902, the above-entitled cause came on for trial before Mr. Chief Justice Bingham and jury; and thereupon the plaintiff, to maintain the issues on his part joined, introduced in evidence by stipulation and agreement of counsel the following papers and documents which were read to the jury, to wit:

1. The original contract between the plaintiff and defendant, the same being in words and figures as follows, to wit:

"This agreement made the nineteenth day of August in the year one thousand eight hundred and ninety-five, by and between Professor Primo Fontana of the city of Carrara, Italy, party of the first part (hereinafter designated the contractor), and Mary Helen Carroll of Howard county, State of Maryland, U. S. A., party of the second part (hereinafter designated the owner),

Witnesseth, that the contractor, in consideration of the fulfillment of the agreements herein made by the owner agrees with the said owner, as follows:

Article 1. The contractor under the direction and to the satisfaction of Heins and La Farge, architects, shall and will provide all the materials and perform all the work mentioned in the specifications and shown on the drawings prepared by the said architects for the interior marble finish of the chapel of St. Anthony of Padua, in the church of St. Matthew, Washington, D. C., including the ceiling of decorative plaster-work and the three windows of transparent alabaster all set up in place complete, which drawings and specifications are identified by the signatures of the parties hereto.

Article 2. The architects shall furnish to the contractor such further drawings or explanations as may be necessary to detail and illustrate the work to be done, and the contractor shall conform to the same as part of this so far as they may be consistent with the original drawings and specifications referred to and identified, as provided in article 1.

13 It is mutually understood and agreed that all drawings and specifications are and remain the property of the architects.

Article 3. No alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the architects, and when so made, the value of the work

added or omitted shall be computed by the architects, and the amount so ascertained shall be added to or deducted from the contract price. In the case of dissent from such award by either party hereto, the valuation of the work added or omitted shall be referred to three (3) disinterested arbitrators, one to be appointed by each of the parties to this contract, and the third by the two thus chosen; the decision of any two of whom shall be final and binding, and each of the parties hereto shall pay one-half of the expenses of such reference.

Article 4. The contractor shall provide sufficient safe and proper facilities at all times for the inspection of the work by the architects or their authorized representatives. He shall, within twenty-four hours after receiving written notice from the architects to that effect, proceed to remove from the grounds or buildings all materials condemned by them, whether worked or unworked, and to take down all portions of the work which the architects shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications.

Article 5. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architects, the owner shall be at liberty, after ten days' written notice to the contractor to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architects shall certify that such refusal, neglect, or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred to the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default shall be audited and certified by the architects, whose certificate thereon shall be conclusive upon the parties.

Article 6. The contractor shall complete the several portions, and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated, namely, on or before the
14 first day of October, A. D. eighteen hundred and ninety-six.

Article 7. Should the contractor be obstructed or delayed

in the prosecution or completion of his work by the act, neglect, delay or default of the owner, or the architects, or of any other contractor employed by the owner upon the work, or by any damage which may happen by fire, lightning, earthquake, breakage or cyclone, or by the abandonment of the work by the employees through no default of the contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid; but no such allowance shall be made unless a claim therefor is presented in writing to the architects within twenty-four hours of the occurrence of such delay. The duration of such extension shall be certified by the architects, but appeal from their decision may be made to arbitration, as provided in art. 3 of this contract.

Article 8. The owner agrees to provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the contractor, agrees that he will reimburse the contractor for such loss; and the contractor agrees that if he shall delay the material progress of the work so as to cause damage for which the owner shall become liable (as above stated) then he shall make good to the owner any such damage. The amount of such loss or damage to either party hereto shall, in every case, be fixed and determined by the architects or by arbitration, as provided in art. 3 of this contract.

Article 9. It is hereby agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work and materials shall be \$28,500—twenty-eight thousand five hundred dollars, subject to additions and deductions as hereinbefore provided, and that such sum shall be paid in current funds by the owner to the contractor in installments, as follows:

Ten thousand (\$10,000) dollars on signing of this contract by Professor Primo Fontana in person and the execution of a bond by said Fontana in the penal sum of fifteen thousand (\$15,000) dollars conditioned on the faithful performance of this contract with sureties citizens of America to be approved by the party of the second part or the aforesaid architects, and balance after the completion of this work. The final payments shall be made within sixty days after this contract is fulfilled.

All payments shall be made upon written certificates of the architects to the effect that such payments have become due and not otherwise.

If at any time there should be evidence of any lien or claim for which, if established, the owner or the said premises might become liable, and which is chargeable to the contractor, the owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify him against such lien or claim. Should there prove to be any such claim after all payments are made, the contractor shall refund to the owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the contractor's default.

Article 10. It is further mutually agreed between the parties hereto that no such certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

Article 11. The owner shall during the progress of the work maintain full insurance on said work, in his own name and in the name of the contractor, against loss or damage by fire. The policies shall cover all work incorporated in the building, and all materials for the same in or about the premises, and shall be made payable to the parties hereto, as their interests may appear.

Article 12. The said parties for themselves, their heirs, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

In the presence of—

PROF. PRIMO FONTANA.	[SEAL.]
GUISEPPE LAGOMARSINI.	[SEAL.]
BOLOGNA FERDINANDO.	[SEAL.]
MARY HELEN CARROLL.	[SEAL.]

Witnesses to signature of Mary Helen Carroll:

GEORGE E. HAMILTON."

2. The original specifications connected with and forming a part of the contract above referred to; and which are in words and figures as follows:

Specification of Labor and Materials Required for Interior Marble-work, Chapel of St. Anthony of Padua, St. Matthew's Church, Washington, D. C., from the Drawings and under the Supervision of Heins & La Farge, Architects, Temple Court, 7 Beekman Street, New York.

General conditions.

These general conditions form part of the specifications for each particular branch of work, and the specifications of all the trades are to be considered as a whole.

Bids.—The owner reserves the right to reject any or all bids.

Permits.—The contractor is to comply with all corporation ordinances, the State and other laws, and is to be liable for all penalties and all damages to finished work, to this or neighboring property, and to life and limb that may occur, owing to his negligence or that of his employees, during the execution of the work, either in contract or extra work. He must obtain and pay for all necessary permits connected with his work.

Laying out.—The contractor is to lay out his own work, do all necessary levelling and measuring, and give the work his personal

supervision, keeping also a competent foreman constantly on the work.

Work furnished by others.—In case work or materials furnished by other contractors, connected with the contractor's work, is imperfect or not correct, the contractor must notify the architects in proper season that they may cause the same to be rectified, thus avoiding delay or damage to the owner.

Dispute.—Should any dispute arise respecting the true construction or meaning of the drawings or specification, the same shall be decided by the architects, and their decision being just and impartial, shall be final and conclusive.

Materials and workmanship.—All materials of every kind and description are to be of the very best quality; samples must be furnished the architects when required, and the materials furnished must be equal to sample. All work necessary for the complete finish of the building as shown by the drawings, and as directed by the specification, is to be executed in the most thorough, substantial, neat, and workmanlike manner, to the entire satisfaction and written acceptance of the architects.

The contractor is to furnish all necessary materials, labor and transportation, and is to provide all tools, derricks, scaffolding, and all other necessary means, utensils and appliances for properly prosecuting his work.

Bracing.—The contractor must use all possible care and diligence in bracing and securing the building against accident and the elements in so far as they may interfere with the proper stability and perfection of the work, and also to be his own judge of the care and diligence required for the same, since the work is at his entire risk until finally completed and accepted in writing. In no case will any excuse of ordinary care or quality of work be allowed, when the nature of the case requires extra care. Every temporary support shall be as strong as the permanent support.

Overloading.—No part of the structure must be loaded during construction with a load greater than it is calculated to bear safely. Should any accident occur through violation of this requirement, the contractor in default shall hold himself solely answerable and liable.

Care of finished work.—Particular care must be taken by the contractor as the building progresses of all finished work, which work must at all times be covered up and thoroughly protected from injury or defacement.

The material to be used throughout is to be good clear white Italian marble with the least possible veinings or cloudings, such as to present a uniformly white appearance; it is to be sound strong stock free from dry seams, holes and flint nodules and capable of receiving a high polish.

Thickness.

The entire pedestal of the 6 free standing columns is to be solid, the cap and base of same may be got out in separate solid pieces; the pedestals of the columns against wall and of pilasters may be built up of slabs, but the carved panels and surrounding mouldings of these pedestals are to be in one piece. Each of the round columns is to be a monolith, with apophyge and fillet at top and bottom. The capitals, bases and square plinth with sunk panel are to be solid.

The pilasters are to be in one piece in their height. The arches also are to be solid as shown on section and the cyma and corona of cornice are to be made of section as shown to build into wall. For all other wall panelling the thickness of material may be determined by contractor provided that the least thickness of slabs be $\frac{7}{8}$ -inch.

All large slabs where necessary to be backed up with slate or similar material.

Jointing.

The scheme of jointing must be carefully worked out by the contractor both as regards artistic and technical results. Joints are to be spaced well apart and the use of small pieces of marble is prohibited. Where jointing is shown on the drawings it must be followed. If for any reason the contractor wishes to depart from the arrangement shown he must first apply to the architects for permission to make the change, failing which he will be strictly held to the drawings. Butt joints throughout are to be tight joints square-edged. A mitre joint is to be used at re-entrant angles but projecting angles are to show solid corners with no joint on the face.

Polish.

All exposed surfaces (except floor and carvings) are to be brought to a very lustrous clear and even polish. Before polishing, the slabs and mouldings are to be taken out of winding and then brought to an even surface, so that when set side by side they will make a fair and even surface and all mouldings will properly intersect and will require no rubbing down at the joints. In polishing, no acid or other chemical, or wax is to be used. When the work is inspected on its arrival at the building this will be specially tested and all pieces found to be improperly polished must be replaced by suitable pieces or repolished in a proper manner as the architects may direct.

Mouldings.

All mouldings must be cut sharply and accurately to profile and to line; they must be polished as highly as the slab-work.

Particular care is to be taken at angles and at jointings that adjoining pieces shall be of exactly the same section. No rubbing is to be done at the joints.

Altar.

The altar with platform, railing and steps is to be got out and set the same as the other work.

Setting.

All of the marble-work called for by the drawings and these specifications is to be accurately set in place by the contractor in a firm, substantial and permanent manner at the levels called for by the drawings, strictly according to the tenor of these specifications plumb, square, level, true in surface and even.

19 The contractor shall provide all anchors, screws, bolts, cramps etc. necessary to the proper bracing, securing and attachment of his work. All work must be set with an air space at the back. Solid grouting is to be avoided under any and all circumstances. At each anchor a stone "chock" is to be used bedded in plaster of Paris, and in very long or high slabs a number of chocks shall be introduced in such manner as to secure the slabs against bending or breaking.

All anchors are to be of heavy brass wire.

Cleaning.

All the marble-work is to be cleaned twice, once upon the completion of the work as it progresses and a second time after the entire work is set in place as will be directed by the architects. All the work will be at this contractor's risk and he will be held responsible for any stains, spots or marks in floors, piers or walls.

Edges and corners.

All edges and corners must be intact and true. Pieces with cracks, rough edges, imperfect or chipped corners or edges will not be accepted. The contractor must exercise the necessary care and diligence against breakage or injury by staining, spotting or other cause.

Protection.

The owner will have built a fence 8 feet high of boards enclosing the chapel with a door with padlock in same and will turn over the whole of the chapel into the care of the contractor who must assume entire charge and responsibility for all his work and materials inside.

20 Any materials stored outside must be protected and looked after by the contractor at his own risk. The owner does not undertake any responsibility in the matter.

Drilling.

This contractor is to drill all holes necessary to secure the marble-work.

Brick-work.

The outside walls will be built, rough concrete floor finished and the chapel will be roofed in when contractor commences to set mar-

ble-work. All brick-work supported on the columns of chapel will be done by owner's brick-masons at such times and in such manner as the contractor may require; the contractor must however keep these brick-masons under his supervision and so arrange that they shall do no damage to his finished work or materials on the ground.

Scaffolding.

The contractor shall provide all necessary staging and scaffolding required in the erection of his own work and of the brick-work carried on his work.

Diagram of jointing.

The contractor shall as speedily as possible after the signing of the contract, submit to the architects his diagram of jointings and the same must be made thoroughly acceptable to them and he shall file with them final copies of the same before proceeding with the execution of the work.

Carvings.

As the details of the carvings are to be quite elaborate, the contractor must before proceeding with the carving, make working models of same and send photographs of these models to the architects. The architects and the owner will pass upon these and the models must be made acceptable to the architects and the owner before they are executed. All the capitals are to be slightly varied one from the other but the general outline is to be
21 alike in all.

The carving is to be done throughout with artistic spirit and finish. The backgrounds are to be carved to a smoothly tooled undulating surface and is to conform to the style and character of the carving in the church of Sta Maria dei Miracoli, Venice.

Floor.

The design and material of floor is to be the same as that of the chapel in Padua. The rough concrete will be finished about three inches below the finished floor level and contractor must do the necessary filling in with Meier's Pozzuolan cement to bring the finished floor up to the required level.

The three steps with risers leading to main floor of church (including wide step on which rests the large columns of nave) are to be of white marble at least $1\frac{1}{2}$ inches thick. All floors, steps and risers are to be rubbed quite smooth but not polished.

Errors.

Should there be any errors or discrepancies in the figures given on the architects' drawings which can be discovered by inspection, the same must be reported to them for correction before the work is commenced.

Rubbish.

Keep all rubbish carefully cleaned up and remove all such and all scaffolding &c. from off the premises at the completion of the work.

The marble is to be as near like the marble in the original chapel of St. Anthony of Padua, in Padua, as can be obtained. A sample slab, 2 feet square, is to be sent to the architects before the work is executed for their approval, and the material furnished is to be equal to sample.

22 Drawings.—All drawings and specifications are the property of the architects; must not be used or copied in any other work; and must be returned to them at the completion of the work for which they were intended. If any be lost or destroyed by the contractor, they must be replaced at his expense.

Contract drawings.—The following is a list of the drawings which form part of this specification and on which the contracts are based:

No. 144. Plan.

No. 145. Elevations A and E.

No. 146. Elevation B.

No. 147. Elevation C.

No. 148. Elevation D.

No. 149. Elevation F.

All to a scale of $\frac{1}{2}$ "—1 ft.

Additional drawings.—Additional detail and working drawings will be furnished as necessary from time to time; and it is distinctly understood that all such additional drawings are to be of equal force with those cited, and the said additional drawings are to be considered as virtually embraced within and forming part of these specifications and the contract to which they relate.

The contractor is to abide by and comply with the true intent and meaning of all the drawings and specifications, and is not to avail himself to the detriment of the work of any manifestly unintentional error or omission, should such exist; nor fail to repeat and make perfect any parts obviously so intended, though simply shown or insufficiently expressed for the sake of brevity or to avoid needless repetition. All writings on the drawings are to be considered as part of the specification.

Dimensions.—Figured dimensions on the drawings are to be followed in all cases in preference to scale measures. In case an error or discrepancy should appear, the contractor is to refer the same to the architects before executing the work.

Defective work.—Any work made without or not in strict conformity with detail drawings, or differing from the requirements of the drawings and specifications, or defaced or injured through negligence of the contractor or his employees, will be rejected, and must be removed, and satisfactory work and materials substituted therefor without delay; and all other work injured, defaced or destroyed thereby must be made good by the contractor in default. Should the contractor neglect or refuse to comply, the owner, or the archi-

pects acting for the owner, shall have the right after three days' written notice to contractor, of employing other parties to make good the work so rejected, injured, defaced or destroyed, and at the contractor's expense.

Subcontracts.—It shall be the duty of the contractor, upon three days' written notice from the architects, to dismiss forthwith any subcontractors or workmen as they may find incompetent or careless.

Guarantee.—The contractor is at his own expense to amend and make good any defects or faults in his work arising from defective or improper materials or workmanship, which may appear within twelve months after the entire completion of his work.

23 Defective construction.—Should the contractor, or his employees know or think at any time that the construction, as shown by the drawings, is not calculated when executed to produce a secure and substantial result, it is his duty to stop further work on same and notify the architects in writing, and only proceed upon written order from the architects themselves.

Jobbing.—The contractor must examine thoroughly the specifications for all the trades, and execute all jobbing, &c., necessary in his work, when and as required.

24 3. A letter from Primo Fontana per C. Fontana to Heins and Lafarge, architects, which is in words and figures as follows:

“725 19TH St. N. W.,
WASHINGTON, D. C., 13th July, 1897.

Messrs. Heins & La Farge, architects, Temple court, 7 Beekman street, New York.

GENTLEMEN: Referring to my contract with Miss Mary Helen Carroll, under date of August 19th, 1895, relating to the interior marble finish of the chapel of St. Anthony of Padua in the church of St. Matthew, Washington, D. C., I take the liberty to call your attention, as Miss Carroll's architects, to the fact that it is impracticable for me to put up any of the work in said chapel in its present incomplete condition, which I am required by said contract to do, and it is utterly impossible for me to complete said contract until the walls of said chapel shall have been completed and the chapel placed under roof.

I take the liberty to notify you that I have had all my material here for more than a month, ready to put up according to contract, and that I have been in Washington one month at heavy expense, waiting to perform my part of said contract, but have been delayed on account of the incomplete condition of the chapel.

Very respectfully,

PRIMO FONTANA,
p. C. FONTANA.”

4. A letter from Heins & La Farge to C. Fontana, which is in words and figures as follows, to wit:

"Heins & La Farge, architects, Temple court, 7 Beekman St.

NEW YORK, *July* 16, 1897.

Mr. C. Fontana, 1725 19th St. N. W., Washington, D. C.

DEAR SIR: We have your note of July 13th, in which you notify us that you cannot go on with the marble-work of the chapel until the roof is on. We venture to differ with you in regard to your interpretation of the clause in the contract to which you refer, for two reasons:

1st. That it is entirely practicable to set your marble-work, so much of it, at least, as is necessary to support the masonry above which rests upon the marble.

2nd. When I visited Washington a week or so ago, at your request, we had agreed that you were to go ahead on this basis.

We have, therefore, to request of you that you will carry out this understanding and commence to set the marble-work upon the outside walls, so far as may be necessary to support the brick-work above.

Our interpretation of the clause in the contract which relates to setting the marble after the roof is on refers to the arcade between the chapel and the church and to the slabs lining the walls.

We wish to call your attention to the fact that the general conditions printed on the specifications provide that the architects are to decide disputes arising respecting the true construction or meaning of the drawings or specifications. We are distinctly of the opinion

that it will make a better piece of work to have the columns
25 along the wall and the arches above them set in place before the wall is carried up any higher, as the inside lining wall can then be properly bonded to the outside wall, and the columns themselves can be anchored firmly in place. If you do not proceed as above, you will have to hold yourself answerable for any damages which may occur through your refusal so to do.

Yours very truly,

HEINS & LA FARGE,
Per G. L. HEINS."

5. Letter from Primo Fontana per C. Fontana to Heins & La Farge, which is in words and figures as follows, to wit:

1201 20TH ST. N. W.,
WASHINGTON, D. C., *9th Dec.*, 1897.

Messrs. Heins & La Farge, architects, Temple court, 7 Beekman street, New York.

GENTLEMEN: The work on the contract of Prof. Primo Fontana in the chapel of St. Anthony of Padua, at St. Matthew's church, Washington, D. C., has progressed so far that it becomes necessary to request that you forward at once to me the plans for the ceiling. Any delay in furnishing these plans will cause me considerable unnecessary expense, which I wish to avoid. You will recall that the price of this work was agreed to be \$250.00:

You will oblige me greatly by a prompt compliance with my request.

Respectfully yours,

PRIMO FONTANA,
p. C. FONTANA.

6. A letter from Primo Fontana per C. Fontana to Heins & La Farge, architects, which is in words and figures as follows, to wit:

1201 20TH St. N. W.,
WASHINGTON, D. C., 31st Dec., 1897.

Messrs. Heins & La Farge, architects, Temple court, 7 Beekman St.,
New York city, N. Y.

GENTLEMEN: I have to inform you that I am now ready to put up in the chapel in the church of St. Matthew's the ceiling of decorative plaster-work called for in my contract with Miss Mary Helen Carroll under date of August 19th, 1895, and I have further to inform you that nothing has been done towards putting in place the framework, including the lath, to receive said decorative plaster-work, which you on the 16th instant promised me you would have done right away.

You are hereby respectfully notified to have said framework and lathing put in at once and thereby save the expense to Miss Carroll that may result from my having to wait to have said framework and lathing put in.

Respectfully,

PRIMO FONTANA,
p. C. FONTANA.

26 7. Also stipulation of counsel agreeing that the items and amounts stated in the bill of particulars attached to the declaration filed in this cause shall be considered as part of the plaintiff's case without further proof thereof by the plaintiff, and shall have the same force and effect as if sworn to by the plaintiff.

And further to maintain the issues on his part joined, the plaintiff's attorney read in evidence the deposition of PRIMO FONTANA who in substance deposed and testified as follows, to wit:

That he is forty-six years of age, a resident of Carrara, Italy, and at present employed as director of the artistic and industrial establishment of Walton, Goody & Cripps, Limited, of Carrara, and has been so employed since the first of December, 1900, but prior to that time was an architect and sculptor, owning his own workshop at Carrara twenty-two years; that he obtained a contract for the performance of certain marble-work on the chapel of St. Anthony of Padua in the church of St. Matthew's in Washington; the work to be performed was a chapel in marble with columns and arches, cornices, frieze, pilasters and carved capitals, all in the style of the fifteenth century, with pavement of colored marbles and designs, and altar with rich bas-relief and all in imitation of the chapel of St. Anthony of Padua; that he does not know by whom the contract

was prepared but the same was sent to him for his signature by his agent at Washington and was signed by him, he thinks, in September 1895; that the names Guiseppe Lagomarsini and Bologna Ferdinando were signed to the contract as witnesses to his signature; that the estimates for said contract were based upon designs and specifications sent him by his agent at Washington, and that he received a sketch of the work in 1893, and

27 the regular designs and specifications in 1894; that he began the preparatory work on said marble in the performance of his contract as soon as his brother Coriolano returned from America in July 1895, and that he thinks he made his first shipment to America of said marble, which consisted of about seventy-five cases containing some of the pedestals, columns and arches in May 1896; and that substantially all the marble required to execute said contract on his part was prepared and ready to be shipped to Washington in June 1896; but that he did not ship the marble when ready because he was informed by his agent in Washington that the roof and walls were not ready to receive the marble in accordance with the contract and specifications; that he was prepared to commence the setting of said marble in the chapel of St. Matthew's church in Washington, in June 1896, if he remembers correctly, as the first shipment made in May had already arrived there; that his agents in America were Achille de Vecchi and Coriolano Fontana; that he did not commence the setting of the marble when he was ready because the roof and walls in accordance with the contract and specifications were not ready; that he wrote many times to his agent, at Washington, ordering him to request the architects and agents for Mrs. Robbins to hurry the completion of the roof and walls in order that his marble-work could be set in place, and that his agent in compliance with his orders wrote many times to the architects and agents of Mrs. Robbins without ever having any reply from them; that his agent wrote many times to the agents of Mrs. Robbins advising them that the roof and walls were not ready to receive the marble, but that he does not remember the exact dates of these letters but is certain some were written before June 1896 and after; that had he begun the setting of the

28 marble when ready, he could have performed fully his part of said contract in three months at most after the arrival of the marble at Washington, and that the time necessary for the transportation of the marble from Carrara to Washington would have been about twenty to twenty-five days; and that had the walls of the chapel been completed on the first of June 1896 and the roof on he could have fully completed his part of said contract by about the end of September 1896; that his agent advised by letter the agents of Mrs. Robbins in June 1896 that the first shipment of marble had arrived and that he was ready to commence the setting of the marble, and that between June and October 1896 and afterwards the agents of the defendant were notified concerning the condition of the walls and roof of said chapel, but he could not state how many times, and that he did not receive a reply direct from

them. That the drippings of mortar and cement on marble, and rain-water filtering in the walls where there is lime and cement, stains the marble, corrodes the polish and the water weakens the fastenings with which the marble is attached to the walls, affecting the solidity of the work; that marble can be more easily set in warm than in cold weather; that he paid his brother Coriolano Fontana, ten dollars a day and five dollars a day for expenses, for all the time he was in America from June 1897 to August 1898, and that he paid Christiano Zambelli four dollars a day from about the end of May 1897 until March 1898; that the loss and damage resulting to him in consequence of the defendant's delay in completing the walls and roof of said chapel, was to him incalculable; that he was obliged to neglect other offers and refuse new ones, and therefore lost his clients and was obliged to sell his establishment at Carrara and accept employment with Walton, Goody & Cripps, Limited, where he is now employed, and that he could not therefore, set a

29 definite sum as representing his loss; that in the bill of particulars there are items for extra storage because the chapel not being ready to receive the marble on its arrival, he was obliged to place it in storage instead of in the church, and for extra cartage because he was obliged to haul the marble from the warehouse to the church, and for interest because the walls and roof of the chapel not being ready to receive the marble work he was delayed five months in completing his work and receiving payment therefor.

On cross-examination the witness testified that he did not go to America himself for the purpose of getting the contract for the marble-work in said chapel, nor did he send an agent, for the reason he had an agent in America at that time; that his brother, Coriolano Fontana, was sent to America in 1895 to close the contract, and that his brother had no connection or interest in the contract other than his agent, but that he paid him a salary; that he did not come to America at any time during the performance of his contract with Mrs. Robbins; that at the time he bid for the marble-work in said chapel, he knew the church and also the chapel were being built but he did not know by whom, and that he did not know that Mrs. Robbins only contracted to be responsible for the marble-work in said chapel, but he was sure, on the contrary, that according to article 7 in his contract she was responsible for all the work; that he was not informed by Heins & La Farge, the architects, that Father Lee was building the new St. Matthew's church and also said chapel, and that Mrs. Robbins only contracted to be responsible for the marble-work to be done in said chapel, nor was his agent Coriolano Fontana so informed by Mrs. Robbins or by Heins & La Farge, nor by George E. Hamilton, nor did Coriolano Fontana so inform the witness; that he made the first shipment of marble to America from Carrara by way of Genoa and that the same arrived in Washington in the month of June, 1896, and that the last shipment of marble was made in 1897 but he did not remember the precise date; that at

30 the time he made the first shipment he knew that the church and chapel were in no condition for him to begin the marble-work, being so informed of the fact by his agent, but that the

shipment was made in order that the work on the walls and roof of the chapel would be hurried. That he was informed by the agents and knew the conditions of the brick-work when he sent his brother Coriolano Fontana for the purpose of setting the marble, but that his reason for sending his brother, Coriolano, to America at that time was to compel Mrs. Robbins, or her agents, to put the chapel in condition to receive the marble-work in conformity with his contract and to convince her of the necessity of doing the same—the delay in preparing the walls and roof being already too prolonged and having already cost him in consequence large damage; that he was informed by his brother Coriolano, after he reached Washington, that the walls were not finished and the roof was not on, but that he was not informed by him that it would require several months before the marble-work could be commenced; that he permitted his employees to remain in America when he knew that they were unable to work on the chapel, for the reason that he thought Mrs. Robbins, or her agents, would hurry the work on the walls and roof, as was their duty in conformity with their contract and that he thought this work could easily be finished in three weeks; that he was informed by his brother Coriolano, after his return to Italy in August 1898, that he had been advised by Mrs. Robbins to go back to Italy to remain there until the church and chapel were sufficiently advanced to permit of the marble being placed in position; that he knew nothing about the date when his agent actually began the work, the efforts they made to begin the setting of the marble, the conditions of the walls and roof of the chapel, nor did he have any personal knowledge as to anything done by Mrs. Robbins or her agents, in regard to having the walls and roof put in condition to enable his employes to begin work, except what was

31 written to him by his brother Coriolano; that his agents, after their arrival in Washington on the 11th of June 1897, could have begun the setting of said marble at once, as there was no preparation of the marble necessary to be made before it was set, because it was all ready to be set—the only time necessary to prepare for the setting of the marble was the time necessary to bring it from the warehouse and unbox it; he thinks his agents left Italy to go to Washington either the 27th or 28th of May 1897; that he never notified the defendant personally and never personally received any answers to notices sent,—the only notices given were by his agent; that the marble could not be set in said chapel before the roof had been put on, given the conditions of the contract and specifications; that in answer to the question, “Was there anything, if you know, to prevent your agent from setting the marble or the greater portion of it, before the roof had been put on the chapel,” the witness answered, “Yes, the danger of storms and also the conditions of the contract and specifications;” witness testified that he had a contract with Father Lee for four columns of Verona red marble with bases of the same and capitals of white Carrara marble, and that he supplied the columns f. o. b. Georgetown, according to the contract, and that his agents did not put them up and that the

cost of these columns according to the contract was eight hundred dollars each, including capitals and bases, f. o. b. Georgetown, but witness did not remember when the work was done; that had his agents been working in Italy instead of at Washington, he would have paid his brother Coriolano from three to four dollars per day for this class of work; that Coriolano Fontana was not to receive for his work a certain percentage of the contract price for the work the witness had under contract in relation to the chapel; that he paid his brother, Coriolano Fontana, ten dollars per day with five
32 dollars a day extra for expenses, and C. Zambelli \$4.00 per day, but witness could not state precisely the amount paid each employee during the time they were hired at Washington.

Plaintiff further to prove the issues on his part joined, read in evidence to the jury the deposition of CORIOLANO FONTANA who deposed and testified in substance as follows:

That he is thirty-seven years of age, a resident of Carrara and by occupation an expert in marble; that he has followed his occupation in Carrara, Sidney, Australia, Italy and in America; that he knows both of the parties to the suit and that he is a brother to the plaintiff; that he came to America in 1895 in the interests of his brother for the purpose of closing the contract with Miss Mary Helen Carroll, for the interior marble-work for the chapel of St. Anthony of Padua in the church of St. Matthew's in Washington, and that he obtained a contract from the defendant for the plaintiff for the interior marble-work on said chapel, consisting of finely carved marble—an altar, pavement, columns, bases and capitals, wainscoting, arches, etc., three transparent alabaster windows and decorative ceiling; and that the contract was signed by the defendant on the 19th of August, 1895, and by the plaintiff two or three months later, and that said contract was prepared in Washington by the defendant's lawyer, G. E. Hamilton; that his brother's estimates were based upon drawings and specifications prepared by Heins & La Farge, which the plaintiff received through his agent de Vecchi in 1892 or 1893; that the witness returned to Italy in August 1895; that the plaintiff began the preparatory work on said marble in the performance of said contract early in September 1895, and that the first shipment of marble to America was made in 1896, but witness did not know exactly when; that substantially all the cut marble required to execute said contract on
33 behalf of the plaintiff was prepared and ready to be shipped to Washington in June 1896, but same was not shipped because the plaintiff knew from his agent that the chapel was not ready; that the plaintiff wrote the witness to Australia that he was prepared in June 1896 to commence setting the marble, but that witness did not know the conditions of the walls and roof at that time as he was in Australia; that in response to the question as to when the plaintiff was ready with the said marble did he begin work of setting the same, and if not why not, the witness answered "No, when I went to America in 1897 the chapel was not ready to

receive the marble and consequently could not have been ready in 1896;" that on the 10th of June 1897 witness told the architects the chapel was not ready to receive the marble and he begged them to hasten the finishing of the walls and roof so he could begin the setting of the marble; that afterwards he wrote them several times protesting against the delay but that nothing whatever was done by the defendant or her agents in response to any notice until July 1897, when they commenced the work on the walls; that if the plaintiff had begun the setting of the said marble when ready he could have performed fully his part of said contract within two or three months, and that the plaintiff could have completed his contract in three months at the outside; that the witness landed in New York on the 9th of June 1897, having been sent by his brother to hasten the work and to superintend the setting of the marble-work in the chapel; that in June 1897 he found the walls of the chapel were built only twenty-two feet instead of about thirty-four feet, there was no roof and one side of the chapel was not enclosed; that on his arrival in America he went to see the architects and asked them if the chapel was ready. They told him it was not but asked him to put up part of the marble first and afterwards they would go on with the walls and roof. Witness told

34 them that the marble-work was too delicate to be exposed to the weather. Then they told him to go on with the work, that Father Lee had a lot of work to give him if he would please him; and that witness told them he would go to Washington and see what could be done.. That this conversation took place at the architects' office in New York; witness came to Washington on the 11th of June 1897 to put up the marble-work in the chapel; that on his arrival in Washington he examined the chapel and found the walls were only twenty-two feet high, the chapel was not closed in and the roof not on, and the floor was two inches too high for the marble-work according to the plans; that he wrote to the architects after his arrival in Washington telling them he could not go on with the work in the present state of the chapel, and that he tried also to see the defendant or her lawyer but they were not there, being, as he was told, in Europe; that the architect, Mr. Heins, came personally to Washington in response to his notice and again requested him to go on with the work, asking him to make the risers one inch each higher to overcome the error in height of floor; that he told the architects he would do his best to go on with the marble-work and commenced it; that he attempted to do some of the work because the architects requested him to do so, and that he put up the pedestals under the arch at the opening into the church and about twenty-one feet lineal of wainscoating; but that he stopped work because of several heavy thunder storms and the rain beating on the walls came down on the marble-work, staining it and softening the plaster in which the columns which held the marble-work in place were imbedded, thus loosening the marble from the fastenings; that drippings of mortar or cement stain the marble and eat off the polish, that rain-water in itself has no

effect, but when dripping from a wall in which there is cement or mortar it spoils the polish and stains the marble beyond repair; that if witness could have begun setting of marble in

June, 1897, and continued, he could have fully completed
35 the work according to said contract within between two

and three months; that witness saw Mr. Hamilton, the attorney of the defendant, at the end of July, 1897, and told him of the condition of the chapel and asked him to try and hasten the work; that Mr. Hamilton told witness he could do nothing and that he did not know where Miss Carroll was, but would try and get her address and communicate with her; witness told Mr. Hamilton that he was under heavy expense on account of the delay and that Mr. Hamilton said to witness, "Don't be afraid, all your expenses will be paid." That witness did not see the defendant in Washington but did see her at the end of August, 1897 at Coney island, and that he informed her of the delay and asked her for an advance of \$5,000 on account of the contract, which was refused. Witness then told her of the condition of the chapel and asked her to hurry the work on the walls, which had already commenced but was going very slowly. That defendant said she had nothing to do with the brick-work and declined all liability for the delay; that she advised witness to go back to Italy and wait there until the chapel was ready for the marble-work. That witness told her there was no use of his going back to Italy because his brother's capital was all sunk in this job, and he would have nothing whatever to do if he went because his brother had been obliged, under the circumstances, to refuse other offers; that after his visit and conversation with the defendant he returned to Washington; that the work of building the walls of the chapel was begun about the end of June or early in July, 1897, and that the work of putting on the roof of the chapel was begun at the end of July or early in August, 1897, and that witness commenced the setting of the marble on the 18th day of October 1897, and that it was not possible for him to commence earlier; that when he began the setting of the marble in

October, he found the marble previously set was stained and
36 loosened from the walls and the plaster between the walls

was rotten and that he was compelled to take it down; that at the time of the commencement of the work of setting the marble in said chapel, the roof was only half on; witness further testified that he was further delayed for about two months on account of the failure to put up the framework for the ceiling; that he notified the architect several times in October, November and December 1897, and in January 1898 of the delay in putting up the framework for the ceiling; that he did not receive the diagram of drawings of the decorative ceiling until early in February 1898; that the plaintiff's part of the contract was completed the 15th of March, 1898, and notice was given a few days before to Messrs. Heins & La Farge, the architects, and that final payment was received for the marble-work sixty-one days after the completion of the contract. Witness further testified that marble can be set more easily in warm than

in cold weather; that he received ten dollars per day and five dollars per day for expenses from the plaintiff while he was in America attending to plaintiff's part of said contract; that he had one skilled marble-cutter, Christiano Zambelli, who came with him from Italy, and he employed others in America; that he paid the said Zambelli four dollars per day and the other skilled laborers the same for eight hours' work; the witness further testified that he was delayed at least one hundred and fifty days from doing the plaintiff's part of the work on said chapel on account of the unfinished condition of its walls and roof and by not receiving the diagrams of its walls and ceiling in proper time; but that he did not know exactly what the total loss was to the plaintiff, but he knew the delay caused the plaintiff's ruin; that the item for storage in the bill of particulars was for amount paid by witness for

37 storing the marble in warehouse during the one hundred and fifty days and that the charge for extra cartage was made because the marble was hauled from the station to the warehouse and from the warehouse to the church, instead of directly to the church from the station; that if witness could have commenced the work in June 1897 he could have finished in three months at the most, but as he could not commence and was delayed for five months, interest was charged therefore for such time on the deferred payment.

On cross-examination the witness testified as follows:

That he came to Washington in 1895 in June or July, and that he did not remember whether he personally put in a bid for the work for the chapel of St. Anthony of Padua in St. Matthew's church, but was of the opinion that he did; but that the final bid on which the contract was awarded was put in by Achille de Vecchi, acting as agent for the plaintiff, in August 1895, and that the bid was addressed to either Messrs. Heins & La Farge, the architects, or Mr. G. E. Hamilton, attorney for the defendant; that the witness made an examination of the plans and specifications of said church and said chapel and also examined the church or chapel so to be erected before the final bid was put in; witness in response to the question as to whether or not he knew that Father Lee representing the parish-oners of St. Matthew's church, was the owner of the church and chapel and that the defendant had no interest therein, or connection therewith, before the final bid was put in, the witness replied, "No, I do not think I did at the time the bid was put in," and that he did not think he was so informed at the time the bid was put in, by either Father Lee, Messrs. Heins & La Farge or Mr. G. E. Hamilton, or by some or all of them, but that he was so informed afterwards in 1897 by all of them; that the bid authorized to be made was made to Mr. G. E. Hamilton and all negotiations in relation thereto were conducted with him as the defendant's attorney.

38 In answer to the question, "Who were the architects employed by Father Lee to superintend the construction of the church and chapel," the witness replied, "I cannot swear to it, but

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Heins & La Farge, I think ;" and witness further testified that the chapel was built by a contractor named Robert Clarkson, that he did not know whether he was employed by Father Lee or not ; that the church was built before he arrived in America, that he could not say who the contractor for it was ; that he was informed by his brother that de Vecchi wrote to the plaintiff from time to time of the progress of the work ; that witness left Washington in August 1895 for Italy and returned to Washington on the 11th of June, 1897 ; that witness was in Australia in 1896 and was informed by his brother by letter that the plaintiff had completed the preparation of all the marble in Italy for said chapel, in June 1896, but that witness could not state how long it took the marble to reach Washington ; that the plaintiff learned of the condition of the church and chapel in June 1896 from his agent Achille de Vecchi. In response to the question of what personal knowledge the witness had of any effort made by the plaintiff to have the walls of said chapel built in the summer or fall of 1896, the witness answered, "I only know of what my brother wrote me and what the architects told me when I arrived in New York in June 1897, and that is, that my brother's agent de Vecchi had repeatedly requested them to hasten the completion of the walls."

Witness further testified on cross-examination that he did nothing personally to hurry up the completion of the walls until June 1897 on his arrival in New York, when he asked the architects to finish the walls and put on the roof, and afterwards he protested and wrote several letters to the architects, and

39 that he also had frequent conversations with Mr. Hamilton after his return from Europe in regard to the matter ; that the witness could not state positively that the plaintiff ever directly notified the defendant or her agents of the condition of the chapel, but witness was very sure that they were so notified by de Vecchi, the plaintiff's agent, because the architects told him so and the witness did so himself after his arrival in America in June 1897, both by letter to the architects and personal conversations with Mr. Hamilton and with the architects ; that the witness could not say from personal knowledge that the defendant received any notice from the plaintiff about the condition of the work on the walls and roof of the chapel in the summer or fall of 1896 ; that Robert Clarkson was the contractor who had charge of the construction of the walls and roof of said chapel, but witness did not know by whom he was employed. That there was no preparatory work to be done on the marble after its arrival in this country before the same was set in the walls in said chapel, but that everything was ready to be put up ; that witness was in Australia between June and October 1896 and only knows of the notices given by the plaintiff to the agents of the defendant as to the condition of the walls and roof of said chapel between those dates from what the plaintiff told the witness and from having seen after his return to Italy the copies of the plaintiff's letters to de Vecchi asking him to notify the defendant's agents to hurry the work ; that the agents referred to by the wit-

ness as having received said notices are Heins & La Farge, the architects; that both the witness and plaintiff knew of the condition of the chapel in June 1897 and that was the reason that witness went to America to try to hasten the finishing of the chapel because they could not wait any longer; that witness came to Italy solely at the direction of the plaintiff and on his arrival in New York, the architects requested witness to go to Washington; that

40 witness was informed by Messrs. Heins & La Farge and Mr. Hamilton in 1897, but was not sure about Father Lee, that

the architects Heins & La Farge were employed by Father Lee to superintend the construction of said church and said chapel, and were not employed by the defendant; that he saw the defendant for the first time after his arrival in America in June 1897 at Coney island. In response to the question "Is it not a fact that the chapel was sufficiently advanced in its construction when you arrived in Washington to permit your going to work on the marble portions of the building," the witness answered, "No." Witness further testified on cross-examination that the walls of the chapel were only twenty-two feet high when he reached Washington. In response to the question, "Did you not inform the attorney for the defendant on your arrival in Washington that the weather was too unsettled to start the work at that time but that you would begin work in about two or three weeks," the witness answered, "No, I did not." Witness further testified on cross-examination that it was not possible for him to begin work on the first of July, 1897, that he tried to commence and found it impossible to continue; that witness was informed by the architects that it was entirely possible for him to proceed with the work at that time and was directed by them to so proceed, but that witness declined and protested; that witness had a conversation with the architects in June 1897 at their office in New York and later in Washington. When in New York the witness asked the architects just what was the condition of the chapel and told them he had come to put up the marble. They said the chapel was not finished but that witness could start the work and they wanted him to put up part of the marble, up to the arches. Witness told them he would try, then when they came to Washington to verify the levels of the floor they again requested witness to go on with the work. Witness stated

41 that he would do his best but was forced to stop the work; that witness refused to carry on the marble-work until the chapel was under roof, stating as his reason that as the roof was not on and the walls were not up to the full height, some damage would be caused by the bricklayers to plaintiff's work, also mortar and cement dripping on the marble would stain it beyond repair, and under the contract witness was compelled to deliver the work thoroughly cleaned and undamaged; that witness did not remember saying anything about desiring the work to be an advertisement for his brother; that Robert Clarkson was the contractor who did the brick-work on the chapel, but witness did not know by whom he was employed; that Mr. Guastavino was the contractor who put

the roof on said chapel, but witness did not know by whom he was employed; that the witness did not know that these contractors were under the sole control and direction of Father Lee and his architects, but witness remembers of asking Father Lee to try and hurry up the work. In response to the question of "State what communication you had, if any, with the defendant in the summer of 1897 concerning the progress of the work on the walls and roof of said chapel," the witness replied, "In August 1897, I saw defendant at Coney island. I informed her of the state of the chapel and requested her to let me have \$5,000 on account of the contract, which she refused. Then I told her the work was going on slowly and that I had come to America to hurry it up. She said she could not help it and declined any liability for the delay. She then advised me to return to Italy and remain there until the chapel was ready for me to begin. I told her that was not possible because all my brother's capital had been sunk in the job and he had no more money to carry on other work, and he had refused already a good many orders and there was no use for me to return to Italy until I had finished the contract. She said she could do nothing whatever

42 for me." Witness further testified on cross-examination that he attempted to commence his work on said chapel in June 1897 by direction of Heins & La Farge, architects, and put up the pedestals under the arch at entrance to the church from chapel and about twenty-one feet of wainscoting. In answer to the question, "Was it not possible for you to erect a temporary roof or covering over the marble-work that you set so as to keep the rain from it," the witness replied, "It might have been possible, but in putting up the permanent roof they would have completely spoiled my work. I didn't look into the matter of a temporary roof because the contract said the roof should be on before I commenced my marble-work."

Witness further testified on cross-examination that when he started work in October half of the roof was on; that he was not delayed after this by the roof, but by the delay in receiving diagram of ceiling. In response to the question "Was it not possible for you to put in all of the marble-work before the roof was put on except that portion immediately under the roof," the witness answered, "Not under the terms of the contract." In response to the question, "Did she (meaning the defendant) not inform you that she had no connection whatever with the construction of the walls or roof of said chapel, and that she was not personally liable therefor," the witness answered, "Yes;" and that she further told witness that she had no control whatever over the contractors who were building said walls and said roof, and that she advised witness to return to Italy to wait until the chapel was in condition to put in his marble-work; that witness told her that all his brother's capital was sunk in this job and plaintiff had no more money to carry on other work, and there was not any use for witness to return to Italy until the contract was finished, and that his brother had been obliged to refuse other

43 orders and so they had nothing to do; that when the defendant told witness that she was not responsible for the work on the walls and roof of the chapel she referred witness

to Father Lee and his architects, Messrs. Heins & La Farge, as being the parties whom he could consult in that matter; that plaintiff had a contract with Father Lee for furnishing four marble columns with bases and capitals delivered in Washington, but witness did not remember the total amount received by plaintiff for this work. In response to the question, "State what proportion of the marble-work could have been done before the roof was put on the chapel," the witness answered, "None, because my brother was responsible for the damage and stains according to his contract." Witness further testified on cross-examination that he was further delayed in his work on the ceiling about two months, between December 1897 and February 1898, on account of not receiving the drawings therefor; that the drawings for the ceiling were to have been prepared and furnished to the witness by the architects, Heins & La Farge; that witness saw the defendant after he had finally completed his work under the contract and asked her when she could pay amount due; that the negotiations with reference to the final payment on the contract were conducted with the Fidelity & Deposit Company of Baltimore; that witness never made any request of the defendant either personally or in writing, to submit the matters in dispute between them in regard to the final payment, to arbitration; but that witness did make such a request of Mr. Hamilton, the defendant's attorney, by word of mouth, but did not remember the date; that witness had no financial interest whatever in the contract; and that he did not obtain any other contracts in America while putting in the marble-work on said chapel.

The plaintiff further to prove the issues on his part joined, called W. L. BELT, a witness of lawful age, who testified in substance as follows: That his occupation is that of a bricklayer and that
44 he has been engaged in that calling for about eleven years; that he was employed in doing work on the church of St. Matthew's in this city, and that he was employed by Mr. Clarkson and Mr. Fontana; that he began work there some time in June 1897 on the walls and roof, and that at that time the walls were twenty feet high; that the walls were to be about thirty feet high; that he was engaged there in bringing the walls up to the height of the roof about a month or six weeks and that the walls were completed some time in the latter part of July or August; that the work of putting on the roof was begun in September 1897 and was completed the last of October; that the roof was composed of iron and terra-cotta; that he thinks Mr. Fontana began the setting of the marble-work after the roof was completed,—it was pretty cool weather and was about some time in November, and doesn't remember whether the roof was completed when Mr. Fontana began his work; that he was employed by Mr. Fontana during the whole time Fontana was working there, and that after Mr. Fontana began Fontana worked from 7.30 in the morning until any time from ten to twelve o'clock at night; that his only experience in marble-work consisted in the backing up of it; that the work that Mr. Fontana

did there was the interior finish of said marble, all carved and highly polished, the floor was of marble laid in blocks of diamond shape; that plaster Paris is used by marble-workers in setting marble; that cement and terra-cotta was used in putting on the roof and that the terra-cotta pieces were about twelve inches long and six inches wide, and an inch thick; that the walls were put up to receive the marble linings and the linings had to be put in by iron columns and holes had to be drilled into them and then into the marble and it was put in the brick wall and then sunk into the marble; and in response to the question "Could this work be done in pieces, or did it have to go up all together," the witness replied,

"It went up all together sir."

45 Q. "Why did it have to go up altogether, the lining, the pilasters and pillars, and cornices there?" A. "It is necessary to put up those columns before they could turn those arches over it."

Q. "How would it be as to the slabs lining the walls?" A. "That is all bonded together in behind these columns."

Q. "Is it possible for any one to work behind one of these slabs if the pillars have been put in first?" A. "No sir, there is only from an inch to two-inch space behind it."

The witness further testified that he was employed at the church for about a month or six weeks in putting up the brick walls, and the witness in response to the question as to whether or not this was an unusual length of time for putting up the walls answered, "It was sir, because we were not in a hurry about it, because we had not received the material for the roof;" and that if they were in a hurry for it he was of the opinion that they could have put up the walls in a couple of weeks; that witness had seen that dripping water from cement was apt to stain marble; witness did not remember how long Mr. Fontana was in this country before he could go to work setting the marble in the chapel, but knows it was quite a good while; that Mr. Fontana came to the building every day to wait until the walls were up and the roof on; that after he began the setting of his marble-work Mr. Fontana was further delayed in not being able to get some beams and the wire lathing for his ceiling, but witness did not know how long he was delayed.

On cross-examination the witness testified that he went to work in June, 1897, on the church structure and that he was employed at that time by Mr. Clarkson and that he saw Mr. Fontana at that time; that after they had started the work on the brick-work it progressed as rapidly as could be expected for the number of men they had working on it, but there were no unusual delays; that
46 after Mr. Fontana started to work in the performance of his marble-work, he was further delayed waiting for the ceiling which he was to finish his work against; witness does not remember when Mr. Fontana finished his work; witness thinks he left there about April; that witness worked for Mr. Clarkson until he went to work for Mr. Fontana some time in October; that his work for Mr. Fontana consisted in setting up marble and packing in

behind it and that Mr. Fontana worked his force until ten or eleven o'clock at night; that they used no cement at all in setting the marble but used plaster Paris, that cement was used for the brick-work; that Mr. Fontana had about ten men working for him, laborers and all; that some of Mr. Fontana's material was there boxed up. Witness thought it was packed in the cellar of the chapel, but did not think any of it was lying around on the ground exposed to the weather; that there was no material delay in the brick-work as far as witness knew, from June until October, while he was employed by Mr. Clarkson; that after Mr. Fontana began to set his marble there was no material delay until April with the exception of the delay occasioned by the absence of iron beams from the roof, but the length of the delay witness did not know.

On redirect examination witness testified that when he went to work for Mr. Fontana in 1897 that Mr. Fontana had to take down some of the work he had previously done, the witness did not know how much he took down, but testified that the work he took down was the first course of marble; in response to the question as to why he had to take the marble down, the witness answered, "It had been exposed and the water had gotten down behind it and laid there. He felt as though the joints were not sufficient to hold it and he took it down to start a new one;" that there was no cutting or carving done at the chapel by Mr. Fontana but that all the marble was shipped here carved.

47 On recross-examination the witness testified in response to the question, "Is it not a fact that that first course of marble was taken down by Mr. Fontana because it was set at a wrong height, at an improper height, and the architects directed it to be removed," the witness testified, "I don't think so, sir. We didn't have to get in any new levels for to try it again;" that the marble Mr. Fontana took down was the marble which he put up during the summer while witness was working for Mr. Clarkson in putting the walls up; in response to the question "So that Mr. Fontana did do some work before October," the witness answered, "He had to leave the work, yes sir, because the stuff was coming down on him so that he could not stay underneath there." In reply to the question "What stuff?" the witness answered "Material such as the laborers dumping bricks, and we were cutting the bricks and the like up there, and he could not stay there and work. He was directly underneath our scaffold and it was impossible for him to work." That Mr. Fontana recommenced his work in October after the scaffolds were out of the way.

The plaintiff further to prove the issues on his part joined called JAMES A. CLARKSON, a witness of lawful age, who testified in substance as follows:

That he is a resident of Washington and by occupation a brick-layer and has been so engaged for about twenty years or more; that he did work on the chapel of St. Matthew's church in this city and was employed there about two or three years altogether by Father

Lee, the pastor of the church; that he was employed and did some work there for a short time for Mr. Fontana helping to set the marble; that to the best of the witness's recollection in the summer of 1897, the walls were up about twenty feet high, from the level of the top of the floor, but were not ready to receive the roof—that the

48 walls had not gone up high enough to receive the roof; that the walls had to go up twelve to sixteen feet higher than they were in the summer of 1897, before the roof could be put on; that the walls were carried up the required height somewhere about the latter part of July or August; witness thought that they started putting on the roof some time in September, but witness did not know when the roof was completed; that Mr. Fontana set some marble a short time after he came here but stopped, but witness did not know for how long or why he stopped, nor when he resumed the work of setting the marble; that witness was employed by Mr. Fontana some time near to December—the latter part of November or the first of December. Witness in response to the question as to “What was the nature of the work which Mr. Fontana did up to the time you say he stopped in the summer time,” the witness answered, “Well it was the base.”

Q. “What was the character of this work he did there, Mr. Clarkson?” A. “Well the base, you know, is not handsomely carved like the other work.”

Q. “I am speaking of the whole work. What was the nature of it?” A. “It was a very nice job of carving, handsome work and very delicate.”

Q. “Have you worked much on marble?” A. “Off and on sir. Not a great deal.”

Q. “What effect has the dripping of cement on marble such as was used in this chapel—the drippings of cement from above?”

A. “Well, cement will stain marble.”

Witness further testified that the roof of the chapel was put on with terra-cotta slabs an inch thick and about six or eight inches wide and iron was also used; witness did not know when Mr. Fontana arrived in this country but thinks he came to this country

49 about the time when witness was ready to put the balance of the work up to receive the roof; that they heard he was coming and they took the scaffold from the interior of the church or chapel and put it on the outside, so as to be out of Fontana's way, to give him a clean sweep.

On cross-examination the witness testified that his father, Robert B. Clarkson, was the contractor for the brick-work; that witness was at work there some time during the summer of 1897, doing the brick-work and that it went along according to contract; that there was no delay on witness's part in the execution of the work or on the part of the brick contractor. In response to the question “Was there any delay that you know of that could have been avoided,” the witness answered, “The only time that I know of was in the roof,” but witness did not know what was the nature of the delay as he had nothing to do with putting on the roof.

And thereupon the plaintiff rested.

The defendant on her part in order to prove the issues joined, testified in substance as follows:

That her full name is Mary Helen Carroll Robbins. That she was married in April, 1897, and that her maiden name was Mary Helen Carroll and that she is the defendant in this suit and the person named in the contract with Mr. Fontana.

The witness was thereupon asked the following question,

"Q. I want to ask you if you are the owner of the St. Matthew's Church building here on Rhode Island avenue."

To which question objection was made by the plaintiff and sustained by the court. To which ruling an exception was noted by the defendant.

Witness further testified that she was residing in Howard county, Maryland, at the date of the contract and came to Washington to see Mr. Hamilton about the contract but did not remember the date when she came; this contract was prepared in Mr. Hamilton's office and was first executed by Mr. Fontana in Italy and then returned for her signature; the first time she saw Mr. Coriolano
50 Fontana was at the Oriental hotel at Coney island, at the end of August or September, 1897.

In reply to the question "Did you receive any communication from, or have any interview with Mr. Fontana from the 19th of August 1895 up to the date of that interview at Coney island," the witness replied, "I cannot remember whether he wrote to me or not, but I saw him then. That was the first time I saw him after the contract was signed."

Q. "Will you please state the substance of the interview which took place on that occasion." A. "As far as I remember, he said that he came over here and the walls of the chapel were not ready for the marble to be put up and would I please hurry them. I said that I could not hurry them as I had nothing to do with the walls. I think he went on arguing about that and I think I said 'You had better go back or wait somewhere.' He said that he was spending a lot of money about it. I said I had nothing to do with the walls."

The witness further testified that at the time of the interview at Coney island Coriolano Fontana made no claim against her for three thousand eight hundred dollars (\$3,800), and never made any claim before that time, and did not after that time until he brought suit; that she paid Mr. Fontana the contract price of twenty-eight thousand five hundred dollars (\$28,500), as the payments came due, that she paid the ten thousand dollars (\$10,000) specified in the contract, before the work was commenced.

On cross-examination the witness testified that she never saw Primo Fontana, the plaintiff in the case, and that the interview she detailed as having taken place at Coney island, was between her and Coriolano Fontana, the agent of the plaintiff.

51 That in reply to the question "Did you not on that occasion, advise him to return to Italy as you had nothing to do

with this contract and was not responsible for it," the witness answered, "I think I remember saying that; I don't remember my exact words."

Q. "Did he tell you that his brother had already been delayed too long and had suffered great damage in consequence of it?" A. "I don't remember just what he said."

Q. "Did he make any reference to the damage his brother had already suffered in consequence of the walls not being up and the roof on?" A. "No, I don't think he did."

Q. "Did he complain of not being able to go on with the work?" A. "He said he could not go on."

Q. "And he told you the reason why he couldn't go on?" A. "Yes, I think he did."

Q. "Did he not tell you that his brother had nearly all of his capital tied up in this work and requested you to advance him some money on account of this contract?" A. "Don't remember of his saying that then?"

Q. "Did he ask you for an advance of five thousand dollars?" A. "I don't think it was then he did that—in that interview."

Q. "Did you have another interview with him?" A. "Yes, I had two interviews with him—two interviews at the Oriental hotel."

Q. "About the same time?" A. "Yes, but I didn't say much to him."

Q. "Did he in any one or the other of those interviews tell you that his brother had already suffered a great deal of damage?"

A. "I can't remember his saying that."

52 Q. "Did he not tell you that his brother had most of his capital tied up in the work and did he not ask you to advance him five thousand dollars?" A. "He did ask me to advance him money but I don't remember when it was—whether it was through my lawyer or to me—he asked for an advance."

Q. "And in this interview you disclaimed all responsibility for the building of the walls or the roof; did you not?" A. "Yes sir, I did."

The witness was recalled for further examination and testified as follows:

Q. "Will you please state to the jury what was the extent of the authority of Mr. Heins in June 1897, as your architect and agent in the construction of this chapel at St. Matthew's church." A. "He had full authority from me to look into everything and take charge of everything, because I didn't want to be bothered about details which I didn't know about. He had my full authority."

On cross-examination the witness testified as follows:

Q. "Had you given him any other authority than is conferred by the contract?" A. "No."

By Mr. COLBERT:

Q. "What contract?"

By Mr. MINOR: "Had you given him any other authority than

is conferred by this contract?" A. "Yes, there was a verbal understanding which I had with him which antedated the contract."

Q. "When was that?" A. "It was some time before—I do not remember the exact date when this question of a chapel was spoken of by me."

53 Q. "Did he have any authority to enter into any contract for you on your behalf?" A. "Yes, he had entire authority from me."

Q. "To bind you in any way?" A. "Yes, I made myself liable for any arrangements he made."

Q. "Can you tell us, in a few words, what was the nature of the authority you conferred upon him, and how you conferred it?" A. "I do not remember the exact words, but it was arranged between us that Mr. Heins should look after the work and see that it was done, and anything that he thought should be done about it should be done by his direction and I would be responsible for any arrangement he made."

Q. "And that was the work contemplated in your contract with Mr. Fontana?" A. "Yes sir."

Q. "That particular work?" A. "Yes, any work about the chapel."

Q. "You cannot approximate the date of the understanding?" A. "No, I don't remember the exact date."

On redirect examination the witness was asked the following question:

Q. "Where was this arrangement made?" A. "It was made at Mr. Hamilton's office."

To the foregoing question and to the question asking for the extent of the architect's authority, in June, 1897, other than is contained in the written contract, the plaintiff by his counsel objected, which objection the court overruled, and the plaintiff then and there noted an exception, which exception was noted on the minutes of the court, and counsel for the plaintiff prays the court to sign and seal, this his first bill of exceptions, which was accordingly
54 done now for them this 30th day of January A. D. 1903.

E. F. BINGHAM,
Chief Justice. [SEAL.]

The defendant further to prove the issues on her part joined called GEORGE L. HEINS, a witness of lawful age, who testified in substance as follows:

That the name of his firm is Heins & La Farge, architects, and that witness had been practising as an architect in his own name since 1884, that his office is in New York, and as far as possible doing business all over the country. Witness did not remember the exact date but thinks it was about 1895 that he became connected with the construction of the new St. Matthew's church. It was about two years before this chapel contract was made; that he had had previous experience in the construction of church buildings.

That the contract in this case was a regular stock blank form, it was a printed form. Witness could not positively state he filled it in, it was filled in in typewriting; he never saw the plaintiff, Mr. Primo Fontana, but met his brother; that he met plaintiff's brother some little time, perhaps a month or two, before the contract was signed, and thinks he met him at the witness's office in New York city, that Fontana came to see witness about figuring on the work.

In response to the question, "It is provided in this contract that Mr. Fontana should complete his work on or before the first day of October, 1896. Can you tell the jury why it was that he did not commence his work until the following year?" the witness answered, "He was not ready."

Q. "Who was not ready?" A. "Mr. Fontana."

Q. "Do you know for what reason?" A. "His marble was not there."

Q. "So that, while he was required to complete his contract
55 in October 1896, his marble was not ready until the following year?" A. "He was not ready. It had not come at all until the following spring, as I recall it the spring of 1897."

The witness further testified that the marble-work was all cut and carved in Italy, prepared to go into the building; that the marble was not in this country until the spring of 1897, during the winter or early spring of 1897 it commenced to arrive—the first shipment, and that all that had to be done after its arrival was to set it up and do the little fitting that is always necessary about the joints—sometimes there is a little cutting and trimming to make it fit exactly.

Q. "Do you know when the marble arrived in this country?"
A. "In the early spring of 1897."

Q. "What stage of construction had the building reached at that time?" A. "The walls were up, I think, to the level of the interior marble columns and the top of the shaft. I have here a true drawing."

Witness further testified that the plaintiff could have gone to work in the early spring of 1897 and that he directed him to do it. In response to the question "For what reason did he not go to work," the witness answered, "He came to see me in New York and said the roof was not on and he couldn't go to work. I told him that I had had the scaffold taken out from the interior and put outside so as to complete the remainder of the outer wall from the outside. I instructed him to go on. There was no reason why he should not go on. Then he agreed to do so, and came down here and started to set some of these bases. I came down about a week or so after that, after he got started, and found that he had set them about three-quarters of an inch too low, in fact it was due to his own error. He furnished the columns for Father Lee under a separate contract."

56 Q. "Mrs. Robbins had nothing to do with that?" A. "No; he furnished these columns and bases and capitals under a separate contract. The height was figured in these drawings; but

apparently in making them he did not allow anything for the joints so that when they were brought here and set up that extra thickness of the joints put this capital about three-quarters of an inch higher than the correct figured height. He started from this line (indicating) and we found it was not coming out on this level here (indicating). He had not appreciated that it was important for that cornice line (indicating) on account of the decoration of the side wall, to come true with the line given. The way he figured it, this line (indicating) would not have come true. So I had him take down all the work he had set and to set it up again by the true level. Then he refused to go on."

Q. "What reason did he give?" A. "He said he could not. He said the rain would spoil it."

Q. "What did you say to that?" A. "I said that it could perfectly well be protected."

Q. "How could it have been protected?" A. "By putting a little shelter over it or a little canvas or some boards or some weather-proof paper. There is no difficulty about that."

Q. "What kind of weather was it and what time of the year?" A. "It was in the spring."

Q. "When did he finally go to work?" A. "There was a good deal of talking and correspondence and one thing and another about it, and he finally said he would not go on until the roof was on; so he did wait until the roof was put on."

Q. "What, if anything, did you say to him about protecting him from damage in the event that the marble was stained?" A. "I told him that I would allow him the difference between the
57 protection which he would have to put on the marble-work if the roof were put on as compared with what it would have to be if he went on without the roof."

The counsel for the plaintiff objected to the question being asked or answered. Which objection was overruled by the court, to which ruling of the court counsel for the plaintiff then and there duly excepted and an exception was noted on the minutes of the court and the counsel for the plaintiff prays the court to sign and seal this his second bill of exceptions, which is accordingly done now for them this 30th day of January, A. D. 1903.

E. F. BINGHAM, [SEAL.]
Chief Justice.

Q. "What response did he make to that?" A. "That seemed to be acceptable to him."

Q. "What did he say?" A. "He agreed to go on."

Witness further testified that he did not know and never could find out why the plaintiff did not go on with the work; that he enquired of him but got no satisfactory reply, that plaintiff's agent said something about the work that he had done having been damaged in some way, but witness saw the work and could see no damage to it whatsoever; that the concrete floor was rough concrete

and was left several inches below the proper level. The witness thinks there was a slight bulging in the centre and that it had not been laid quite true, but it was not expected that it should be true. It was near enough; that the contract provides that the concrete should be laid in the rough; that the plaintiff should put in the finished floor; that the plaintiff did not erect certain columns that were furnished by him but that all the plaintiff had to do was to deliver the columns here; that witness thinks the columns used in the chapel forming the wall of the chapel towards the nave came in the winter of 1896—that they came in the winter before Fontana

came to set his brother's marble-work; that witness knew de
58 Vecchi and understood he was the plaintiff's agent, that he came representing him; that witness had a letter from Mr. de Vecchi stating that the roof of the chapel was not on and that they were waiting to begin to set their marble-work, and that witness wrote him in reply telling him that he wished the plaintiff to go on without waiting for the roof and witness thought that was in February, 1897, and that he received no reply to that letter, but that next thing he knew Mr. Fontana had arrived; that after Mr. Fontana arrived in this country in 1897, witness thinks he came first to his office, and that witness told him at that time he wished him to go right ahead in the setting of his marble without waiting for the roof and it was then he agreed to do so.

The witness was then asked the following question:

Q. "Will you please explain to the jury why it was necessary that he should have done this work in that way? Explain the plans you had there and from your knowledge of the construction of buildings, why it was necessary to improve these instructions." A. "This is a cross-section (indicating). At the time these drawings were made the outer construction was not fully determined. We were simply designing the interior of the chapel and the drawings for this (indicating) were made subsequently, so that the construction here (indicating) was not fully indicated. But the roof had to rest on this outer wall and run across to this side (indicating) and the roof was in turn supported by these columns (indicating). But we did not get those columns until, I think, the winter of 1896. Mr. Fontana furnished those columns for the church and we could not put the roof on until we built those columns so we had to get those columns and set them before we could go any further. In addition to that, a further study of the details of construction convinced us

that it would be really better to carry out this wall, this brick
59 wall (indicating) and the rest of the columns and arches that would have to be built after this marble-work was set. This is the outer wall (indicating) which is connected with this lining and opposite each one of these columns there is a buttress. We came to the conclusion that inasmuch as this brick-work had to be carried out above the marble-work, in any event it would be better to build it all at once. We had one wall up to here (indicating) and we took the scaffold out and put it on the outside, so as to give him a chance to get next to the lining and we were to build the outer

wall from the outside, at the same time this wall (indicating) was building from the inside, so as to bond the two together and make a better construction."

And the counsel for the plaintiff objected to the question being asked or answered; which objection was overruled by the court; to which ruling of the court counsel for plaintiff then and there duly excepted and the exception was noted on the minutes of the court and the counsel for the plaintiff prays the court to sign and seal this his third bill of exceptions which is accordingly done now for them this 30th day of January A. D. 1903.

E. F. BINGHAM, [SEAL.]
Chief Justice.

Witness further testified that there was some brick-work that had to be done and was done after the marble-work was set in place. That the second wall was built after the columns were in place; that it was utterly impossible to put the roof on until these columns were in position. There was an arcade there; and witness thinks he did not get the columns until the winter of 1896 and that they set them and built the arch as soon as they could. In response to the question "After these columns came here from Italy, was there any delay in the execution of the work on the building," the witness answered "We had waited at this level (indicating) so as to have him put these up."

60 Q. "You waited on him for some time? How long did you wait on him?" A. "I could not say exactly, I do not know that we waited on him particularly except that—of course we did not start to carry up the work on this side (indicating) until we got these columns and the columns were put in just as quickly as possible after they got here."

Q. "After the columns got here and were put into position was there any delay in the execution of the work?" A. "No, I do not think so except that his refusal to carry this on in this way obliged us to make more elaborate construction for the roof to support it outside, than we had originally planned. It was carried on as rapidly as it could be done, after we got to going."

Q. "There was something about this photograph that you wanted to explain?" A. "That simply shows that while the marble carving was delicate, the marble itself was very substantial."

The witness further testified that Mr. Fontana's marble arrived here in the spring of 1897 and that it was brought up to the grounds as it came and as we had place for it. Some of it did not come until the autumn of that year. Witness remembered going down to the customs-house with Fontana, that they needed some pieces and witness went with him to see if they could not hurry them up; that witness thought that some of the upper pieces did not arrive until the fall of 1897; that there was no cement used in any of the brick-work in connection with the marble, because cement stains marble; only lime mortar was used; that lime does not

stain marble for the reason that both are lime, marble is crystal-
-ized limestone, and that neither lime or plaster of Paris does any
harm to marble if it comes in contact with it. The witness
61 did not see that there was any danger that would apply to
Mr. Fontana from dropping cement from the roof or else-
where in the building. In reply to the question of "Was there any
cement used in the roof," the witness answered, "Yes, but I should
not have used the same construction in the roof probably. The
roof that I had originally planned had steel beams across it." Wit-
ness further testified that when Mr. Fontana arrived in this country
in June 1897 the walls were up sufficient height to enable him to go
on with the execution of his contract—that the walls were up a
matter of about twenty feet.

Q. "Under the terms of this contract, which has been offered in
evidence here, it is provided that 'The owner agrees to provide all
labor and material not included in this contract, in such manner as
not to delay materially the progress of the work.' Was there any
delay in furnishing labor and material in the work in any part of
that building which delayed Mr. Fontana?" A. "If I understand
that correctly, the only thing we had to provide was the brick-
masons who did those walls resting on the marble-work. That was
the only part that concerned him."

Q. "Did you have a sufficient number of brick-masons to do that
work?" A. "Yes, Mr. Clarkson did that work."

Q. "And did it promptly and satisfactorily?" A. "Yes."

Witness further testified that he employs a great many superin-
tendents for superintending that kind of work and that witness was
of the opinion that \$15.00 a day paid to Mr. Fontana would be a
large price to pay to any man for this work; that the carving had
already been done and that all that was necessary was to set it in
position and that a reasonable price to pay a superintendent
62 for this work witness thought certainly should not be
more than \$50.00 a week, that that would be a very good
price; that when the marble arrived in this country and during the
course of construction, it was protected from the weather by being
boxed up and sometimes it was protected by burlaps and sometimes
by paper, that it was not waxed over or anything of that kind put
on the face of the marble; that Mr. Fontana agreed to go on with
the work according to the change witness suggested, that Mr. Fon-
tana did actually commence to do his work in the spring or early
summer, soon after he came, that he did a little work—a few pedestals,
but stopped and began again late in the autumn; that when he began
in the autumn he made no claim of any sort except to state that he
had been delayed—he was continually stating that, but he presented
no claim against the defendant, and that witness heard of no claim
for a money payment until he heard of this suit; that after plaintiff
concluded his contract he was paid the final payment. Witness
thinks he did not make any claim at that time against Mrs. Rob-
bins and that witness knew nothing of any claim until he heard of
the suit. In response to the question "Was there any occasion for

any extra storage at the customs-house," the witness answered, "I think he would have had to provide storage in any event."

Q. "Was there any delay that would necessitate extra storage or additional storage?" A. "Instead of going on he waited until the roof was on and of course that period could be called delay, I presume."

Q. "He might have gone on and avoided that expense?" A. "Yes, that was what I wished him to do."

Q. "And the same, I suppose, on the item of extra cartage, and interest on the delayed payment of \$18,500?" A. "I presume that is all in the same class."

63 Q. "I believe you have stated and if not I wish you would state, how Mr. Fontana could have protected his work as it went up without the roof being on." A. "He could have put some boards over it or he could have put metal over it. He could have scooped out along a joint and inserted metal—which perhaps would not be desirable as it might possibly have rusted it some, although bright tin would not—or he might have used waterproof paper."

Witness further testified that there was no cement used there on the brick construction until the outer wall, he thought, was built. The outer wall, that was not in contact with this wall at all and that was being built from the outside, was built with lime and cement mortar, that no cement mortar was used on inner walls and as a matter of fact witness knew of no cement coming in contact with the marble and never saw any stained marble by what was used in the roof, and that he thinks he would likely have seen it had there been; witness has had experience in church-building and has built a great many and that the form of construction that witness directed Mr. Fontana to pursue, was such as was reasonably sufficient to expedite the work; witness has built churches in New York city; that witness has searched for letters from Mr. de Vecchi but was unable to find them; that witness moved his office within the year and a great many things had gotten mislaid; witness may have received some letters from de Vecchi but does not recall any special ones that are not in evidence.

Witness was thereupon asked the following questions,

Q. "What was the extent of your authority as representing Mrs. Robbins to superintend the erection and construction of this building, the work that Mr. Fontana contracted to do, and what was your authority to vary or alter or modify the form of construction
64 and the time and manner of construction?" A. "I had the usual authority of an architect."

Q. "What was that?" A. "I was supposed to have charge of the work. I am supposed to direct the contractors when to begin and how to do their work, the order in which they shall do it and when to start and when to stop."

And the counsel for the *defendant* objected to these two questions being asked or answered; which objection was overruled by the court; to which ruling of the court counsel for the plaintiff then and

there duly excepted and the exception was noted on the minutes of the court, and the counsel for the plaintiff prays the court to sign and seal this his fourth bill of exceptions, which is accordingly done now for them this 30th day of January, A. D., 1903.

E. F. BINGHAM, [SEAL.]
Chief Justice.

On cross-examination the witness testified in substance as follows: That in June 1896, they built the foundation, they built the basement, but witness thought that the walls were not up at all at that time, that witness' recollection was that the foundation and basement were built up to the main floor level, the level at which this marble-work commenced, and was covered over and asphalted and left during the winter, and that that height would be about ten or twelve feet above sidewalk; that the grades there are rather confused and there was a great deal of lifting and lowering. In reply to the question "What was the height of the walls in October 1896, that is at the time when the contract called for the completion of Mr. Fontana's work," the witness answered "The best of my recollection is that we did not commence to carry the walls above what you call the chapel floor line, until the early spring of 1897."

Q. "Is it not a fact that you did not begin to do any work
65 on these walls until the latter part of June or July 1897?" A.

"No; we had them up in the early spring. We had them up ten or twelve feet in June 1897, perhaps more. I can give you the exact height if you wish, but it was a good height."

Witness further testified on cross-examination that the drawings and specifications required the walls to be about thirty feet high, and were up possibly fifteen feet in June 1897.

Q. "Thirty feet?" A. "About thirty feet. About twenty-six and four feet more."

On further cross-examination the witness testified that the plans and drawings were submitted to the plaintiff in this case for his bid, in 1894, and that the drawings on which the plaintiff figured are dated the 28th day of August, 1894, and a copy of the specifications were sent to the plaintiff at that time; that the bricklayers began the work of carrying up the walls to the required height after the plaintiff refused to go on with the setting of his marble, that would perhaps make it in July or August or some such time; that after the plaintiff protested against setting his marble before the walls were up to the height required according to the plans and specifications, the witness did carry the walls up to the full height after the plaintiff refused to go on; that Mr. Fontana did protest against going on until the roof was on and the walls up; that the contract for putting on the roof was let during the summer of 1897 because it was finished in the early autumn of 1897; that the work on the roof was begun during the summer—as soon as the walls were up we put the roof on and it was completed witness thought in September, but witness was not positive; at the time Mr. Fontana began to set his marble in the fall of 1897 the roof was only par-

tially on. He started under that part of the roof we had put on and went along the main wall and we finished the rest of the
 66 roof; that that part of the roof was put on under which he was working; that Mr. Fontana began to set his marble-work about the first of October or in that neighborhood; that when Mr. Fontana came to this country in June 1897, he called on the witness shortly after his arrival and called witness's attention to the condition of the walls and roof at that time, but witness had called Fontana's attention to it very much earlier. That Fontana said nothing about the delay at that time nor did he request witness to hurry the completion of the walls or roof, so that he could go on. He spoke of the situation and witness told Fontana that he wanted him to go ahead with his marble-work and that witness would carry the other wall up as fast as he needed it.

Q. "Did he tell you that he could not do that?" A. "No."

Q. "That he was afraid of injury to his marble from setting it under the open sky, or words to that effect?" A. "No, he said nothing about that at that time."

Q. "Did he not tell you that all of his marble was in this country ready to be set?" A. "No, it was not all here. There was only a part of it here."

Q. "Did you not tell him in that interview to come here to Washington to set the marble-work and try to do it to please Father Lee, as Father Lee had other work for him to do." A. "I may have said something of that kind. He knew there was a great deal of work to be done in the building."

Q. "I am simply asking you if you did not tell him to come here and try to do the work, and try to please Father Lee, as Father Lee had more work for him to do?" A. "Something to that effect."

Q. "He came to Washington shortly after that interview with you?" A. "Yes."

67 Q. "You got a letter from him a few days afterwards telling you of the condition of the floor?" A. "Very possibly; I can't recall exactly."

Q. "Did he not write you and notify you that the floor was two inches too high?" A. "He wrote and told me something of that general tenor."

Q. "Did he request you to come down and verify the level of the floor?" A. "Yes."

Q. "Did you not come here and verify the levels?" A. "I did."

Q. "Did you not find they were wrong?" A. "I found he was wrong. There was an error in the length of the large column. He had not known that apparently." That witness did not know who set the pillars that rested on the floor—which were an inch too low, but thinks it was done by Mr. Clarkson; that the setting was according to the plans and specifications but the columns were too long by about an inch, and that this was overcome in the rough work, by adding to the risers of the steps and a little more concrete was put on the floor to level up.

Q. "I understood you to say that none of the marble was shipped

to this country until the spring of 1897?" A. "None of the marble for the chapel, so far as I know."

Q. "Do you know whether or not there was any shipped here in 1896 of your own personal knowledge?" A. "Not of my own personal knowledge."

Q. "Mr. Fontana says there were seventy-five cases shipped here in June 1896. Can you deny that of your own personal knowledge?" A. "No, I do not."

Q. "Then when you testified that no marble came here until 1897 you did not know it positively?" A. "I don't know
68 positively; I only know there was no marble on the ground at the building; whether it had been at the customs-house or not, I could not say."

Q. "There might have been seventy-five cases or one thousand?" A. "There might have been a hundred thousand in the customs-house."

Q. "You were in New York most of the time?" A. "Yes sir."

Q. "During 1896, we will say January 1, did you receive any communications or letters from Mr. de Vecchi who is referred to as being the agent of Mr. Fontana?" A. "I received a letter from Mr. de Vecchi, I think in 1897, complaining that the roof was not on, and the walls were not up. I replied to that letter."

Q. "You are not positive whether it was in 1896 or 1897?" A. "I am not positive, I think the letter is here."

Q. "You had several letters from Mr. de Vecchi?" A. "Yes, we were in correspondence. It was a pretty important piece of work."

Q. "Are you positive you only received one letter?" A. "I may have received several letters. We were in correspondence generally."

Witness further testified that he received two letters calling attention to the condition of the walls and roof, one from Mr. de Vecchi in the early spring, or in fact in the winter, in February, and another from Mr. Coriolano Fontana in June. That witness remembers of receiving but one letter from de Vecchi about the walls and roof but said he may have received others; witness knew of the condition of the walls and roof between 1896 and 1897; witness had some correspondence with the plaintiff in the case, in 1896 and 1897, but witness did not remember writing any letters hurrying Fontana
69 on with the work in 1896, but may have notified Mr. Fontana before June 1896 or before the first of October 1896, that he he had not much time to lose and to hurry on with his work, but witness did not recall writing such a letter, but usually calls the attention of the contractors to things of that sort if they are behind hand, as a matter of course. That the walls were to be built around three sides of the chapel—in the arcade the walls came within two inches of each other, and above the arcades they spread out to perhaps a couple of feet; the outside walls were being built with cement and lime mortar mixed—a little cement was put in with the lime; that there was an inner wall of brick-work put up with lime mortar between the outside brick wall and the marble lining

put up by Fontana, that the inner wall was from eight to twelve inches.

Q. "You have stated in your direct examination that you afterwards came to the conclusion that it would have been a better piece of work to carry both these walls up together, in order that the two might be bonded together?" A. "Yes."

Q. "That was not according to the original plans and specifications?" A. "It was not according to the original intention."

Q. "That was an afterthought with you, after Mr. Fontana came in 1897." A. "No, I came to that conclusion in making the detailed drawings of the rest of the brick-work—of the walls and of the roof—that it was a better construction. The marble drawings were made before any details were made of the exterior structure at all."

Q. "Is there anything on the drawings or in the specifications that would indicate that there should be any such connection as you have just stated between the inside and the outside walls, that is they should be bonded together and all to go up together?"

70 A. "I don't believe there is anything about that."

Q. "Did you ever notify the plaintiff that you had changed the original drawings and that you wanted the two walls to go up together and to be bonded together?" A. "I notified de Vecchi. I don't think I ever notified Primo Fontana."

Q. "Do you know when you notified Mr. de Vecchi?" A. "That was the letter I was speaking of. I think that was in the spring of 1897, in February. I think I have a copy of that letter here if you wish to see it."

Q. "How much of the marble was here in October 1896 if you know?" A. "I don't believe any of it was."

Q. "I am not asking you what you believe, I want your personal knowledge." A. "Of my personal knowledge, I do not."

Q. "You state in your direct examination that Mr. Fontana did not go on with his work because he was not ready to go on because none of his marble was here? Will you please explain what you mean by that?" A. "Did I state that?"

Q. "I so understood you in your direct examination, to state that Mr. Fontana did not go on with his work because he was not ready to go on." A. "I don't recall having said it."

Q. "Then you were mistaken when you made that statement, if you did make that statement?" A. "I must have been mistaken because he had marble here."

Q. "He might have gone on with his work if he had been in this country in 1896 so far as marble was concerned." A. "If he had his marble here he could have gone on."

Q. "You do not know that he had his marble here?" A. "I do not know."

Q. "You were mistaken when you made the statement that Mr. Fontana was not ready to go on with his work because he
71 did not have the marble here." A. "If I made such a statement—I didn't, of my own personal knowledge know whether he had marble here in 1896 or not."

Q. Of your own personal knowledge, then, if you did state in your direct examination that Mr. Fontana was not ready to go on with his work in 1896, in June, July, August, September or October, because he did not have his marble here—if you did make that statement you were in error, were you not?"

A. "I was in error."

The witness was here shown a letter which he identified and the same was introduced in evidence and read to the jury. The letter is in words and figures as follows:

"Heins & La Farge, architects, Temple court, 7 Beekman St.

NEW YORK, 18th March, 1896.

Prof. Primo Fontana.

DEAR SIR: We enclose approved photograph of carvings. Have you yet sent those of capitals and arches? We would like to have them as soon as possible, as there is no time to lose.

Yours truly,

HEINS & LA FARGE."

72 On further cross-examination the witness testified that the marble was delicate and was quite elaborately carved, and some parts of it very highly polished, and that on the whole it was a very fine class of work, artistic and a good kind of work, and was rather expensive; that the witness thought there was no danger at all so far as Fontana was concerned in putting up the marble-work before the roof was on; that had he gone to work before the roof was on his marble might have been stained and might have been broken unless the marble was protected. In response to the question of what kind of protection would be necessary to prevent breakage from the tile roof, the witness answered, "A board protection—I do not consider the marble was in as much danger after it is built into the wall as it was in coming here from Italy."

Q. "I am asking you about putting on of this roof, and whether, if a piece of tile had fallen down, it would not be likely to damage?" A. "It was not likely to damage Mr. Fontana any."

Q. "Was it not likely to damage the marble?" A. "It might, and if it were not protected it certainly would."

Q. "Is it usual to put up that class of work until the roof is on?" A. "Yes, in a certain sense it is, because every basilica that has ever been built has been built in the way I proposed to build this building. The columns must be set, the walls built above them, before the roof goes on."

Q. "What columns are you referring to now?" A. "I am referring to the marble columns and arches."

Q. "That condition was not originally contemplated when the drawings were submitted to Mr. Fontana?" A. "It was not originally contemplated."

Q. "Was there any danger of bricks falling from these walls while they were going up?" A. "Yes."

73 The witness further testified on cross-examination that there

is iron-work in the roof but they are tie-rods not girders. It is a flat-tile arch roof with these angle irons as tie-rods to prevent it spreading; that there are a good many of these iron beams; witness testified that he thought the red Verona columns that were ordered by the church were ordered in October 1895 or in the spring of 1896; that these columns had nothing to do with the contract with the plaintiff and formed no part of it, but that they were necessary to the building of the chapel; that there was marble panneling against the inner wall of the chapel and that it went up to the top of the arches where it terminated; that had the columns been put up first the pilasters and wall fastenings could not have been put readily in place. It would have to be put up before the columns. That the idea was to put the slabs against the wall in the recess, as it were, build out from there and then set the columns, and then put on the arch and then go on with the other work; that the lining had to go against the wall first, that witness thought it would not have been practicable to put this lining up back of the columns if the columns had been put up first. The witness was then asked the following questions:

Q. "Then these columns and pilasters could not go up until the slab or lining had gone in?" A. "It was my intention to have them go in."

Q. "The brick wall had to go up in order to allow that to be done?" A. "The brick wall was up to the required height for that."

Q. "As required by the specifications?" A. "Not to the full height; but it was up to the height necessary for this work."

Witness further testified that the drawings indicate that the
74 marble arches are to support the brick-work; that the contract in this case was only a printed blank but witness could not recall where it was filled up, whether it was in Mr. Hamilton's office or in his own. That between June 1, 1897, and October 15, 1897, witness testified that he probably saw Mrs. Robbins, the defendant, that he recalled seeing her once in the Waldorf in New York in the winter time; that he had no conversation to the best of his recollection with defendant in regard to this contract with Fontana in that interview but that they discussed the work of building the chapel in a general way, what was doing, and all that; and in response to the question as to whether or not witness ever requested Mrs. Robbins to enlarge his powers under the contract, he answered, "No."

Q. "Was the subject ever discussed between you?" A. "Not that I know of."

Q. "Did she ever increase your powers under this contract?" A. "No, I don't think she did."

Q. "Then the only authority which you had for supervising this work, was the authority conferred upon you by the contract?" A. "By my original appointment by her."

Q. "I mean that all that authority for the doing of this particular contract, for this particular work?" A. "My relations with Mrs. Robbins were not affected by this contract in any way."

Q. "Did you have any enlarged authority from Mrs. Robbins after the contract was entered into?" A. "No; I never had any discussion with her on the subject."

Q. "Then the only authority you had from her was derived from the original appointment?" A. "Yes, as architect."

Q. "From the contract as entered into between the plaintiff and the defendant so far as this contract is concerned?" A. "Yes."

75 Witness on further cross-examination testified that he does considerable work all over the country and that his price is increased when his work is farther from New York, than when it is in New York; that he charges travelling expenses; witness did not remember that he ever paid any superintendent as much as \$10 a day; but that he might have paid that much; that when he sends his superintendents or supervisors to work away from New York that he does not pay them extra as a rule, but allows them travelling expenses, and as to whether or not he allows them for board and keep, would depend entirely upon how long they would be away, if for a week, he would allow their expenses, if for six months, witness would not expect to pay living expenses; but that he has paid living expenses sometimes, and travelling expenses to his superintendents, and that he might have paid as much as \$10 a day for their services; that he does not consider \$4 a day excessive for wages for a skilled workman, that most of the workmen in this country receive about that amount and that some would get more than \$4 a day.

Q. "When you requested Mr. Fontana to come here, or at the time he came here in June, 1897, did you ever after that time have any conversation with, or notify Mrs. Robbins of your having directed him to come here and go on with the work?" A. "I did not."

Q. "Did you ever have any conversation with her regarding it?" A. "No."

Witness further testified on cross-examination that he had been engaged as an architect since 1884 and from that time down to the time he took the contract for the building of St. Matthew's church he had built and finished a church in New York city and one in Brooklyn, and thinks he started one in Providence, but they were all he could think of, but that there were others, and that some of

76 the churches had more or less marble; that there were marble chapels intended to be placed in the church in Providence, but the whole church was to be lined with marble, generally after the manner of St. Matthew's church; that he had never built a church containing a chapel exactly similar to the one in St. Matthew's church; that he had built a church containing a chapel but did not remember that any of them were lined with marble to the extent of this; that there was a course of marble wainscoting, and that sort of thing, but not going to the full height of the walls; that he had never built a chapel containing as much marble as contained in the chapel in St. Matthew's church; that while containing as highly polished marble it did not contain as much in extent; that he has never built a church since 1895, containing chapels ex-

actly similar to the one here in this church; that he has just completed a very important chapel in New York that is lined with stone and marble, which is similar in general character but not in architectural style.

Q. "Do the plans and specifications in regard to the work to be done in this chapel contain the clause that the roof should be put on before the marble-work is completed?" A. "No."

Q. "Did the clause of the contract or specifications in regard to that work contain any provision as to the risk to be assumed by the contractor as to stains, spots, etc.?" A. "Yes."

Q. "But it did not contain a clause about the roof?" A. "No, because the roof was vaulted and it could not possibly be put on until the walls were built."

Q. "That is a different kind of roof?" A. "Yes."

Witness on further cross-examination testified that these basilicas were built before his time, so that he could not speak of his own knowledge as to the time they were building but only knows from
77 his own knowledge of construction; that undoubtedly some of these basilicas were built of fragments of marble put into the building and chapel and carved and polished afterwards; but that he did not propose to build this chapel in this manner, that is, by putting in the marble first and then carving.

Q. "Then all the basilicas were not built as you proposed to build this?" A. "Not all, except so far as the nave arcade is concerned. I make an exception of that."

Q. "Did you ever have any written authority from Mr. Primo Fontana, the plaintiff in this case, to represent him in the making of any contract except as contained in the contract in evidence?"

A. "I never had any such authority."

Q. "Did you ever have any parol authority to represent him in making any contract with the defendant in this case except as contained in this contract?" A. "No."

Q. "You never had any authority either direct or indirect from him?" A. "No."

Witness on further cross-examination testified that if Fontana had gone ahead in compliance with his directions in June 1897, he could have put up the marble up to the cornices above the arcade; and that he would have had to stop after that, witness would have had to put up the brick-work. The idea was that the outer wall should be carried up at the same time as that. That would not have delayed him at all.

Q. "Then in putting on the roof and carrying up those walls, do you think that a few planks thrown over the marble below—I mean if he had gone on—would have been sufficient protection against the weather and against possible falling of tiles and the possible
78 falling of bricks and cement?" A. "I think the projecting cornices should be boxed up rather securely; but if I may say, if he had gone on his responsibility would have ceased when he finished his marble-work, so far as the marble was concerned."

Q. "I am not asking you that, I am simply asking whether in
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your opinion that would have been sufficient protection to the marble?" A. "I think so; yes."

Q. "Do you think loose boards would have protected it from the water and cement?" A. "Yes."

Q. "There would have been no percolation through those cracks?" A. "There would have been a little percolation, but water wouldn't have hurt it."

Q. "As a matter of fact, could he have protected that work except by putting up a temporary roof?" A. "Yes, he need not have had a roof over the whole chapel."

Q. "How would it have been as to the protection of the arches, capitals, etc.—would he not have had to cover these?" A. "He would have had to cover those, yes."

Q. "Would not the roof have had to go up to the height it had gone, would it not have been necessary to raise this roof on the walls behind the pillars?" A. "Canvas would have covered the whole thing over at night or during a rain storm."

Q. "You would have had to put on a canvas or cover of some kind?" A. "Of some kind."

Q. "But you could not have gone ahead putting on the roof without removing this cover?" A. "He could have taken it off and put it on again at night, as all good masons do."

79 The witness further testified that he did not recall ever having asked Mr. Fontana to come to America in June 1897; that he had written him in intervals, at various times, asking him how he was getting along, but does not think he asked him to come to America. That he was surprised when he came and did not know that he was coming; witness's recollection was that the foundation up to the main floor level was built either in the early spring of 1896 or in 1895, and that either in the autumn of 1896 or the spring of 1897 they carried the walls up as far as they thought it proper to go; that after they started work the first time in 1895 or 1896, and carried the foundation up to the level of the floor, that they did no more work up there that time until they started to carry up the walls in 1897. That the floors were asphalted and boarded over and remained one winter, at least, that way and witness thought two winters; that the walls naturally had to be carried up before the marble-work could be put against them, and that the walls should be up a certain height before they could set high enough to back the marble against it and that it would have been impossible to set marble until the walls were partially constructed.

On redirect examination the witness testified to the best of his recollection the foundation was laid and the walls carried up to the level of the main floor in 1895 or the spring of 1896 and that they stopped because they knew the marble-work was not ready and that there was no necessity for it. There was other work to do about the building; that they stopped because the marble was not here; witness did not recall the kind of weather we had in the spring, summer and fall of 1897, but stated it was natural weather for that time of the year, doesn't think there was anything especial about it; that

when he ordered Fontana the second time to go on with the marble-work he refused to do so, and that witness told him that he
 80 was ready to have him go on and that he ought to go on, and that there was no reason why he should not, and that if he refused to go on it was at his own risk, that witness had no way of forcing him to go on.

Witness on recross-examination testified that the roof as finally constructed by him and as now exists on the chapel, rests on the outside walls; and that the drawings submitted to Mr. Fontana indicated that the roof should rest on the outside walls, but only indicated a wooden construction.

The *plaintiff* further to maintain the issues on her part joined called GEORGE E. HAMILTON, a witness of lawful age, who testified in substance as follows:

That he is a member of the bar, that he became acquainted with the defendant in 1894, possibly in 1893; that he had several matters of negotiation before the contract with Fontana was finally entered into; that the actual draft of the contract between Fontana and the defendant was prepared in New York and witness thought in Mr. Heins' office; that it was not prepared by witness; that the contract was the result of several interviews in witness's office, that the representatives of plaintiff were Coriolano Fontana and de Vecchi, that witness's attention was first brought to the Fontana bid in the early summer of 1895, that Coriolano Fontana and de Vecchi came to his office with a letter of introduction from Father Lee, and that the church had then commenced; at that time witness was in negotiation with three others, most of their estimates were very high; witness had considerable negotiation with all these parties; that Coriolano Fontana said that his estimate had been based on the thought that he had to do more work than he found he had to do in the way of the shell or outside preparation, and when he found that it was limited to the marble-work entirely and in the preparation of the marble work in large part, he said he was willing to go over

his figures again; that they had a meeting at witness's
 81 office between Coriolano Fontana and de Vecchi, Heins, Miss Carroll, Father Lee and witness; that the situation was pretty carefully gone over as to what would be included in this work, and the final offer made to me by Coriolano Fontana was \$28,500; that when the bids were received witness had Miss Carroll come to Washington and they talked over the situation and that she agreed to the Fontana bid, and that witness sent for Mr. Coriolano Fontana and Mr. Heins and that Father Lee and de Vecchi were also present at the interview. And that at this interview Miss Carroll stated that she was going to Europe in the winter or early spring of 1896, but witness told her that would be awkward as that was the time at which the work was supposed to be done; she said that she was not a business woman, that she did not know anything about it and would leave everything to Mr. Heins, as far as the chapel was concerned, and to the witness in regard to her legal

responsibilities; that she distinctly stated that she would not have anything to do with the details and informed witness, and Mr. Coriolano Fontana and Mr. de Vecchi were both present, that she would not, and that they must apply to Mr. Heins for any directions or anything in regard to the matter and that she did not want to do anything about it; and that witness's communications were made accordingly, largely with Mr. Heins in regard to questions that subsequently came up respecting the building of the chapel; that Mrs. Robbins stated to witness in Mr. Fontana's presence that the whole matter would be left to Mr. Heins in regard to the direction of the work and that Fontana did not express any dissent; but that he subsequently at witness' suggestion and without it, applied to Mr. Heins to witness's personal knowledge, for instructions and different matters.

To all of which testimony given by the witness in regard to conversations which led up to the making of the written contract under seal in this case, the plaintiff, by his counsel, objected, 82 which objections were overruled by the court, to which ruling of the court counsel for the plaintiff then and there duly excepted and an exception was noted on the minutes of the court and the counsel for the plaintiff prays the court to sign and seal this his fifth bill of exceptions, which is accordingly done now for them this 30th day of January, A. D. 1903.

E. F. BINGHAM, [SEAL.]
Chief Justice.

Witness further testified that some months after the contract was prepared it came back to him with the information that it had been taken away or sent away with Mr. Coriolano Fontana to Italy to be executed and it came back to witness several months afterward executed and signed by Mr. Primo Fontana with the request that witness should have Miss Carroll execute it. That witness did write to Miss Carroll in Howard county, and that she came in and executed it; that the defendant signed the contract several months after the contract had been drawn somewhere along about October; witness did not see Mr. Coriolano Fontana until the late spring or early summer of 1897, but that he did see Mr. de Vecchi who was Mr. Primo Fontana's agent frequently; that Mr. de Vecchi never gave any reason for not going on with the contract; that Mr. de Vecchi frequently came to witness's office to tell him about the contract and different things coming over; that the work was being prepared in Italy; that about February or March of 1897 de Vecchi informed witness and subsequently wrote him the marble was here in large part or considerable part and that as soon as the frost got out of the air they would begin the work; that he did not want to begin the work until the frost was out of the air because of the fact that the chapel was not roofed in; but that as soon as summer weather came they would proceed, and then they would get along with it without interruption; that up to that time de Vecchi had never made the

slightest claim to witness that they were being delayed or hindered in the prosecution of this work by the owners or by Miss Carroll; nor was there any suggestion that he was going to hold anybody responsible for the delay; that as a matter of fact there was no delay to witness's knowledge.

Subsequently, de Vecchi saw witness -long about the latter part of April and wanted to know if the defendant would advance
83 five thousand dollars on the contract, and witness told him no, that she would not, that she had paid considerable sum-in advance of any work and witness thought he could not advise her to advance this money. Witness was then called away to England leaving some time in the early part of May and returning the latter part of June; that shortly after his return witness was called upon by both Mr. Coriolano Fontana and Mr. de Vecchi, who informed him that they were here with their workmen and the chapel was not in readiness because of the roof, as witness understood it, not being on; that they had brought some men over to work and they wanted to know if on that ground and because of their situation, Miss Carroll would advance them five thousand dollars, which had been previously requested by de Vecchi, but that witness declined to do it. That after this interview Mr. Coriolano Fontana came very frequently to witness's office to see him about the fact that there was no roof and that he was hindered in the prosecution of his work; witness referred him to Mr. Heins and told Fontana that it was a matter witness had no knowledge of and could not say anything about it at all as it was none of witness's business; that upon one occasion Coriolano Fontana requested witness to write to Miss Carroll about it and witness refused and told him that Miss Carroll was not to be bothered about such matters, as she had nothing to do with it, and that he further told Fontana that that was a question between him and Father Lee—Father Lee being the pastor of the church; that Fontana's contract and Miss Carroll's obligation related to the lining of the chapel, the marble-work, and had nothing to do with the superstructure or anything of outer construction. That Coriolano Fontana requested witness to get Miss Carroll's address for him and that he did so, but told witness it would be more useful for him to see Mr. Heins; that ten thousand dollars were paid to Primo Fontana before any work whatever was done; that Coriolano Fontana told witness
84 in the summer of 1897 about having been ordered by Mr. Heins to go ahead and do his work without the roof being on. In reply to the question of what Coriolano Fontana had to say about that, the witness answered, "On one occasion he came in to me—and he came in every day of the week, so much so that finally I told him he was doing a useless thing, that if he had any rights he was talking to the wrong man about it, and that he had better get independent advice; I did not care to be bothered about hearing his complaints it being a thing I had nothing to do with, On one occasion I urged upon him that I was not the proper man; to see Mr. Heins, to see Father Lee, to see anybody so it was not me;

but he went on to see Mr. Heins, as he told me, and came back, or he had written to Mr. Heins, or Mr. Heins had been here—at any rate he had seen Mr. Heins—then he came into my office very much excited and said he had seen Mr. Heins and Mr. Heins told him to go on with the work and that he did not intend doing it. I said, ‘Well, if Mr. Heins told you to go on with the work, why not?’ He said, ‘He says he will assume the responsibility, will stand any damage, but that is not what I want, I am building this chapel as a monument to my house and I don’t care to be relieved from damages. I want to be certain that everything will be in such shape that it will not have a stain or blemish on it. I want this as an advertisement.’ On another occasion, he told me again that he had met Mr. Heins and that Mr. Heins had ordered him to go on with the work and that he did not intend doing it; that he would wait for the roof and the walls.”

Witness further testified that Coriolano Fontana did not say he proposed to make any claim for damages by reason of the delay; that Coriolano Fontana could speak English very well and that he talked a good deal of it to the witness, that he was a very nice gentleman but he would get excited and would weep when he
85 was excited. That after the interview above referred to witness only saw Coriolano Fontana casually; that in this interview he told him he had better consult a lawyer; that he never heard anything from Mr. Coriolano Fontana about any specific claim but that he did say that he had been delayed and wanted money advanced on the contract because of those delays; but witness never heard of any claim of this character until very shortly before the bringing of this suit; that the last payment on the contract price was made on the certificate of Mr. Heins and was paid by a check with witness’s counter-signature; that at the time the final payment was made on the contract Mr. Coriolano Fontana made no demand, such as he now makes, to witness; but later he came and told witness he was going to bring suit and that he came in very frequently about the time of the suit and asked witness if some settlement could not be had; that witness never told Coriolano Fontana in the fall or summer of 1897 that he would not suffer any loss by reason of the delay but on the contrary he told Fontana that Miss Carroll had nothing whatever to do with the matter and that witness had nothing to do with any one’s interest but Miss Carroll’s and she had no liability in the premises whatever; that he repeatedly told this to Mr. Coriolano Fontana and wrote him to that effect; that witness never told Fontana that he would reimburse him for any expense he would go to by reason of the delay; that matter was not brought to witness’s attention. That witness never made any such statement, but repudiated any responsibility on the part of Miss Carroll for this work.

Witness stated that he knew Mr. de Vecchi before his death; that he had considerable correspondence with him and knew his signature. Witness was here shown a letter which he identified as the signature of Mr. de Vecchi, as being the letter received by witness

86 from de Vecchi on April 16, 1897. Said letter which was introduced in evidence and read to the jury, is in words and figures as follows:

"1635 19TH STREET,
WASHINGTON, D. C., 16th April, 1897.

Mr. G. E. Hamilton, attorney-at-law, Washington, D. C.

DEAR SIR: In answer to your letter dated 14th April I am glad to be able to say that the greater part of the marble-works belonging to the chapel of St. Anthony for St. Matthew's church are arrived and in storage here.

We are only waiting until the weather is well settled to begin setting the marble in place. As the chapel is uncovered as yet and not protected from rain we are obliged to wait a few weeks longer before exposing fine marble-works to inclement weather and in the open air.

After we are fairly set to work with our men here we hope to have everything finished in a very short time.

In a letter received this morning Prof. Fontana informs me that by the 20th of this month he will ship the last envoy of the marble-works.

Yours very truly,

A. DE VECCHI."

Witness was then shown a receipt dated March 30, 1897 signed A. de Vecchi, agent for Primo Fontana, which was identified by witness and read to the jury; the same being in words and figures as follows:

"Bill No. 12090.

WASHINGTON, D. C., 3/25, 1897.

SVN.

Mr. L. P. Scebold to Philadelphia, Wilm. & Balto. R. R. Co., Dr.
For freight from Canton shipped by F. N. Y.; car No. 54043; way-bill No. 1607; date, 26.

Mark.	Articles.	Weight rate.	Freight charges.	Total.
2	C't marble.	37200	155580 26378	31958

In bond.
Paid.

GEO. W. KNOX,
Per WATSON, 3/30.

KNOX.

Received payment for the company, 3/27 189-.

R. S. FRANK.

WASHINGTON, D. C., *March 30, 1897.*

Received from Rev. Thomas S. Lee, three hundred and nineteen—58/100 dollars, on acc't two columns with white marble capitals, shafts and bases of red Verona marble, plinths of bardiglio, contracted for on April 8th, 1897, freight from Carrara to Washington on shafts.

\$319.58.

A. DE VECCHI,
Agent of Primo Fontana, in Carrara."

To the offering and admission of said receipt in evidence the plaintiff by his counsel objected, which objection was overruled by the court, and an exception then and there duly noted and entered upon the minutes of the court, and the counsel for the plaintiff prays the court to sign and seal this his sixth bill of exceptions, now for them this 30th day of January, 1903.

E. F. BINGHAM, [SEAL.]
Chief Justice.

On cross-examination the witness testified as follows:

That he did not prepare the contract and did not know of his own personal knowledge where the same was prepared; that to the best of his recollection Miss Carroll signed the contract last, and that she signed it several months after it was prepared; that to the best of his recollection he had never seen the contract before it was signed by Miss Carroll; to the best of witness's recollection the defendant signed the contract in his office and that he witnessed it; witness thought that Miss Carroll did not sign the contract in New York; that after defendant signed the contract witness returned it to Mr. Heins; witness does not know when Mr. Fontana signed it. Witness was here handed a letter which he identified as his letter sent from his office and which was introduced in evidence and read to the jury. The letter being in words and figures as follows.

"AUGUST 31, 1895.

A. de Vecchi, Esq., 1635 19th street N. W.

88 DEAR SIR: I will not be in town until Tuesday next. I hear that you have been several times to see me. Miss Carroll writes me that she has signed the contract, and returned it to Mr. Heins of New York. The sureties must be looked after at once, and Mr. Gleason will not be accepted by Miss Carroll. I understood you to say that you could obtain sureties in New York who were of good financial standing.

Yours very truly,

G. E. HAMILTON.
D."

The witness further testified on cross-examination that Miss Carroll may have signed the contract before August 31, but he did not think she did; that the statement made in the letter was a statement witness had heard but afterwards he heard the statement corrected;

that he did not receive such a letter from Miss Carroll as is referred to in the above letter. Witness was rather inclined to think that the letter above referred to referred to a contract that was not, probably because of some defect, executed. Witness remembers that one contract was prepared here in Washington and because of something discovered about it, it was destroyed; that witness was positive that the contract in evidence was not prepared in Washington, but would not say that Mr. Fontana did not sign it after Miss Carroll. Witness testified that he was the attorney of the defendant and represented her in connection with this contract. In reply to the question, "You stated in your direct examination that there was no delay to Mr. Fontana to your knowledge. Have you any knowledge on that point," the witness answered, "None, except what I have from letters and conversations with Fontana and de Vecchi. I will state now, Mr. Minor, that after visiting the church in company with Mr. Heins and Mr. Coriolano Fontana, when the contract was under consideration, I don't think I saw the church until it was completed and I went there to church."

Witness further testified on cross-examination that he had no knowledge of the progress of the work in any way except
89 what he got from the agent of the plaintiff and Mr. Heins, the architect; that Mr. de Vecchi informed the witness of the arrival of the marble in 1897, but did not tell him that marble had arrived before that time, and that he did not mention the subject; witness has no personal knowledge, or otherwise, that marble did not arrive here in 1896, all that he knew was that Mr. de Vecchi told him some had arrived in 1897; that Coriolano Fontana came to his office in June 1897; he came very frequently thereafter, almost daily, that the substance of the interviews witness had with him was in regard to money—he wanted money; Fontana also spoke of the delays as being the reason for his wanting money; Fontana said his workmen were here and that the work was delayed. Witness would refer him to Mr. Heins. Fontana would come back from Heins or with a letter from him and he would talk over the situation precisely as witness has indicated; that on the first occasion Fontana asked witness to see Miss Carroll for the purpose of having her see Father Lee and see what could be done towards the completion of the walls and roof; witness told him it was not Miss Carroll's business. Fontana told witness that the reason he would not go on was that the walls and roof were not on—witness' recollection was that he spoke of the roof not being on and he may have referred to the walls; that impression made upon witness' mind by Fontana as the reason for the advance of five thousand dollars, was because his men were here and he could not go on with the work and it was an expense and he wanted money. Fontana's great complaint was against Father Lee and Mr. Heins. He complained against them very much indeed. He told witness that he went to Mr. Heins to try to get a certificate from him for more money from Miss Carroll and he would not give it. He would go to Father Lee to complain; witness told him to go to

Father Lee as he was the proper one to go to. Fontana would go out there and Father Lee would not listen to him. He went to Father Lee in regard to the unfinished condition of the walls and roof; that Fontana came to witness on two occasions and told him that Mr. Heins had directed him to go ahead with the work, but that Fontana refused; that the letter in record from Mr. Heins to Mr. Fontana, directing Fontana to go ahead with the work, dated June 16, 1897, was submitted to witness before it was forwarded to Fontana, and that witness sent it back to Mr. Heins with the statement that Miss Carroll had nothing to do with it; witness arrived from Europe during the latter part of June 1897 along about the 25th or 26th of June, 1897.

Q. "You stated that Mr. Fontana said he wanted to do this work as an advertisement—that he did not care for the money?" A. "No; I did not say he said he did not care for the money because he was claiming money all the time; that is, he was anxious to get advances. I said he stated that the reparation or the indemnity that had been offered him by Mr. Heins was not satisfactory."

Q. "Was not satisfactory?" A. "No; that with him it was beyond the pecuniary compensation; that his house was doing this as a monument, as an advertisement, and that he was not going to go on with it."

Q. "Those were his words, were they?" A. "I don't know that they were his very words. I know he said 'his house' and 'as a monument and advertisement;' but I don't know that the whole sentence is exactly his words."

Q. "Did he give you any reason for refusing to go ahead other than this?" A. "None outside of that."

Q. "Did he refer to possible stains, damage and defacements to his marble?" A. "No I think not. He may have."

Witness further on cross-examination testified that he had no recollection of the clause in the specifications providing that the walls should be up and the roof on before the marble-work was set, was ever referred to in any conversation with Fontana, although he may have referred to it, or that in any conversation the contract was discussed; that witness told Fontana that Miss Carroll's contract related entirely to the marble-work; in none of the interviews witness had with Mr. Fontana did Fontana ever mention the damage incurred by plaintiff in consequence of the delay to this work; that in these interviews with Fontana witness very frequently told him that it was absolutely useless for him to talk to witness about this matter; that he should go to Mr. Heins or Father Lee; Fontana was complaining that the walls were not done and Mr. Heins had told him to go ahead with the work and Fontana did not want to go ahead under those conditions; that after Fontana started in the fall witness did not hear any more complaints from him except he heard complaints about not getting all the money he wanted.

The defendant further to maintain the issues on her part joined called JAMES KNOX TAYLOR, a witness of lawful age, who testified in substance as follows :

That he is by profession an architect, and at present the supervising architect to the Treasury Department; that he has been an architect for about twenty-five years, that he has had the usual experience of an architect in practice and probably has had charge during his practice outside of his present position, of building six or eight churches and numbers of other buildings—a large number of other buildings at present. That his attention has not particularly been called to the specifications in this case; that he is fairly familiar with the uniform contract blank and has used it himself in his private practice, but it is not used in his official work; that he is acquainted with Mr. Heins and has known him for about twenty years.

92 Q. "It appears here in evidence that before the roof was on Mr. Heins directed the contractor to proceed with his marble-work, and that the contractor objected to going ahead because the roof was not on. I want you to state from your experience as an architect and from your knowledge of this class of work, if it was practicable for the contractor to have done that work without the roof being on?" A. "Yes, sir."

Q. "How could he have done it, and how could he have protected his work?" A. "Well, he could do the work in the regular way, and would simply need a little more careful protection."

Q. "How could that protection have been procured or provided? What would he have had to do?" A. "In one of two ways. There are two or three different ways, but one of two ways would be preferable, I think; either putting a temporary roof over his work or simply wrapping it with burlap and excelsior, and boxing it in. Either one of those ways it could be made secure."

Q. "And with what expense?" A. "Possibly with more expense. It would be more expensive to set it up in that way than it would be if the roof was on."

Q. "I mean could he have protected his work with little expense, comparatively?" A. "Comparatively little expense; yes."

Q. "Could the work have proceeded fairly safely, without the roof being on?" A. "It could have proceeded fairly safely. Of course there are always chances of accidents happening, wherever you put up constructive work."

93 Q. "In this chapel it seems there were two walls, an outer wall and an inner wall; and against the inner wall the marble-work was being laid. Would it have been practicable to put the scaffold on the outside, build the outer wall, and carry the inner wall up at the same time without damage to work of this kind?" A. "Yes sir."

On cross-examination the witness testified in substance as follows :

That he believes he saw the chapel in St. Matthew's church once when it was about two-thirds completed, that witness had never seen a contract containing a clause similar to the one in the specifi-

cations in this case, requiring the roof to be on and the walls up before the contractor should begin to set his marble-work—not exactly those conditions and that he had never worked under any contract containing exactly those conditions but had under one containing similar conditions; witness thought that the plaintiff could have executed this contract as directed by the architects with a little more careful protection, that he would not necessarily have had to put on a temporary roof and that burlap and boxing could have made sufficient protection to marble; witness was not particularly acquainted with the character of the roof; that with care in setting the iron beams of the roof there would have been no damage to the marble-work; there would be some danger but witness did not think a good deal—it would depend upon the carefulness of the contractor who was setting the iron beams. On recross-examination witness was asked the following question :

Q. “Suppose the contractor had been directed by the architect and superintendent in charge of the building to go ahead and perform his work without the roof on, and on the assumption by the architect and superintendent of any responsibility for any damage to the contractor’s work; would it not have been the duty of the contractor to go ahead with his work?” A. “It certainly would.”

Recross-examination :

94 Q. “Suppose the contract prohibited his going on until these conditions were performed?”

To the forgoing question objection was made by the counsel for the defendant, which objection was sustained by the court, to which ruling of the court the plaintiff by his counsel excepted, which exception was duly noted on the minutes of the court; and the counsel for the plaintiff prays the court to sign and seal this his 7th bill of exceptions now for them this 30th day of January, A. D. 1903.

E. F. BINGHAM,
Chief Justice. [SEAL.]

The foregoing is the substance of all the evidence introduced by both plaintiff and defendant.

The defendant then prayed the court to instruct the jury as follows, to wit:

“The jury are instructed that under the pleadings and all the evidence in this case, the plaintiff is not entitled to recover.”

To which instruction asked for by the counsel for the defendant, to return a verdict for the defendant, upon the evidence and all the evidence adduced before them, the plaintiff by his counsel objected, which objection was overruled by the court; and the instruction as prayed for was granted by the court; to which ruling and instruction of the court the plaintiff by his counsel excepted then and there which exception was duly noted on the minutes of the court and

counsel for the plaintiff prays the court to sign and seal this his 8th bill of exceptions, which is accordingly done now for them this 30th day of January, 1903.

E. F. BINGHAM,
Chief Justice. [SEAL.]

And thereupon, to wit, on the 4th day of November, 1902, pursuant to instructions so given, the jury returned a verdict for the defendant, whereupon, thereafter, to wit, on the 6th day of November,

95 A. D. 1902, the plaintiff, by his counsel moved the court to set aside the verdict in said case and to award a new trial and assigned as reasons therefor, the following, to wit:

1. That the verdict is contrary to the evidence.
2. Because of errors at law in the rulings of the presiding justice.

And another day, to wit, on the 16th day of December, A. D. 1902, the court upon hearing the said motion for a new trial, overruled the same and refused to grant a new trial.

To which ruling of the court, refusing to grant a new trial, to plaintiff, the plaintiff by his counsel excepted then and there and the exception was duly noted on the minutes of the court, and the counsel for the plaintiff prays the court to sign and seal this his ninth bill of exceptions, which was accordingly done — for them this 30th day of January, A. D. 1903.

E. F. BINGHAM,
Chief Justice. [SEAL.]

And thereupon the plaintiff appeals to the Court of Appeals of the District of Columbia.

96 Supreme Court of the District of Columbia.

THURSDAY, *February 5th*, 1903.

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, justice, presiding.

* * * * *

PRIMO FONTANO, Plaintiff,	} No. 42237. Law.
vs.	
MARY HELEN CARROLL ROBBINS, Defendant.	

Upon consideration of plaintiff's motion herein in open court, it is ordered that the time within which to file a transcript of the record of this case in the Court of Appeals be, and it is hereby extended to and including March 20th, 1903.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia, } ss :

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 96, inclusive, to be a true and correct transcript of the record, as per rule 5 of the Court of Appeals of the District of Columbia, in cause No. 42,237, at law, wherein Primo Fontano is plaintiff, and Mary Helen Carroll Robbins is defendant, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe
Seal Supreme Court my name and affix the seal of said court, at
of the District of the city of Washington, in said District, this
Columbia. 18 day of February, A. D. 1903.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1287. Primo Fontano, appellant, vs. Mary Helen Carroll Robbins. Court of Appeals, District of Columbia. Filed Mar. 10, 1903. Robert Willett, clerk.

COURT OF APPEALS,
DISTRICT OF COLUMBIA.
FILED

APR 16 1903

Robert Willing
CLERK

Court of Appeals, District of Columbia.

APRIL TERM, 1903.

PRIMO' FONTANA, Appellant,

v.

MARY HELEN CARROLL ROBBINS.

No. 1287.

BRIEF FOR APPELLANT.

BENJAMIN S. MINOR,

Attorney for Appellant.

Sheiry, Printer, 423-415 Ninth Street.

Court of Appeals, District of Columbia.

APRIL TERM, 1903.

PRIMO FONTANA, Appellant,
v.
MARY HELEN CARROLL ROBBINS. } **No. 1287.**

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an action upon a contract under seal to recover the sum of \$3,888.10 on account of time lost and extra expenses incurred through delay caused the plaintiff in the performance of his undertaking. The contract was entered into on August 19, 1895, by the plaintiff, Primo Fontana, of Carrara, Italy, party of the first part, with the defendant, Mary Helen Carroll, now Robbins, of Howard County, Maryland, party of the second part. In consideration of the sum of \$28,500, promised to be paid by the defendant, the plaintiff undertook, under the direction and to the satisfaction of certain architects, to provide all the materials and perform all the work shown in the drawings and specifications of said architects "for the interior marble finish of the Chapel of St. Anthony of Padua, in the Church of St. Matthew, Washington, D. C., including the ceiling of decorative plaster work and the three windows of transparent alabaster all set up in place complete." The work was to be completed on or before October 1, 1896. Provision was made for the extension of the time set for completion upon certain contingencies; among them "the neglect, delay,

or default of the owner, or the architects, or of any other contractor," and so forth.

Article 3 of said contract provides as follows:

"No *alterations* shall be made in the work shown or described by the drawings and specifications, except upon a written order of the architects, and when so made, the value of the work *added or omitted* shall be computed by the architects, and the amount so ascertained shall be added to or deducted from the contract price. In the case of dissent from such award by either party hereto, the valuation of the work added or omitted shall be referred to three (3) disinterested arbitrators, one to be appointed by each of the parties to this contract, and the third by the two thus chosen; the decision of any two of whom shall be final and binding, and each of the parties hereto shall pay one-half of the expenses of such reference."

Article 8 of said contract provides as follows:

"*The owner agrees to provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the contractor, agrees that he will reimburse the contractor for such loss; and the contractor agrees that if he shall delay the material progress of the work so as to cause damage for which the owner shall become liable (as above stated) then he shall make good to the owner any such damage. The amount of such loss or damage to either party hereto shall, in every case, be fixed and determined by the architects or by arbitration, as provided in Art. 3 of this contract.*"

The specifications prepared by said architects, *which were made a part of the contract*, and upon which appellant based his estimate, and undertook and agreed to do the work, among other things provide as follows:

"THE OUTSIDE WALLS WILL BE BUILT,
ROUGH CONCRETE FLOOR FINISHED, AND

THE CHAPEL WILL BE ROOFED IN WHEN THE CONTRACTOR COMMENCES TO SET THE MARBLE WORK. All brick-work supported on the columns of chapel will be done by the owner's brick-masons at such times and in such manner as the contractor may require; the contractor must, however, keep these brick-masons under his supervision and so arrange that they shall do no damage to his finished work or materials on the ground." Rec., pp. 13, 14.

"All the marble-work is to be cleaned twice, once upon the completion of the work as it progresses, and a second time after the entire work is set in place as will be directed by the architects. All the work will be at this contractor's risk, and he will be held responsible for any stains, spots, or marks in floors, piers, or walls." Rec., p. 13.

"The owner will have built a fence 8 feet high of boards enclosing the chapel with a door with padlock in same and will turn over the whole of the chapel into the care of the contractor who must assume entire charge and responsibility for all his work and materials inside.

"Any materials stored outside must be protected and looked after by the contractor at his own risk. The owner does not undertake any responsibility in the matter." Rec., p. 13.

"Any work made without or not in the strict conformity with detail drawings, or differing from the requirements of the drawings and specifications, or defaced or injured through negligence of the contractor or his employees, will be rejected, and must be removed, and satisfactory work and materials substituted therefor without delay; and all other work injured, defaced, or destroyed thereby must be made good by the contractor in default. Should the contractor neglect or refuse to comply, the owner, or the architects acting for the owner, shall have the right, after three days' written notice to contractor, of employing other parties to make good the work so rejected, injured, defaced, or destroyed, and at the contractor's expense." Rec., p. 15.

“ The contractor is at his own expense to amend and make good any defects or faults in his work arising from defective or improper materials or workmanship, which may appear within twelve months after the entire completion of his work.” Rec., p. 16.

Defendant's single plea denied causing delay to plaintiff and alleged full performance on her part, including the full payment of the price stipulated.

Immediately after the signing of the contract, the plaintiff began work in Carrara on the marble, preparatory to having the same ready to be set up in the chapel and completed within the time provided in the contract. In May, 1896, about 75 cases of the marble were shipped, and arrived in Washington in June, 1896 ; and practically all of the marble was cut and ready to be shipped to America in June, 1896 ; but owing to the fact that the plaintiff learned at that time that the walls of the chapel had not been completed and the roof had not been begun, the plaintiff did not forward the balance of the marble to America as he was about to do. As soon as the plaintiff learned of the unfinished condition of the walls and the roof of the chapel he directed his agent in America to notify the defendant, or her architects, requesting them to complete the walls and roof immediately, as he was ready to put up the marble ; and in compliance with his request, his agents notified the architects before June, 1896, and repeatedly thereafter, of the unfinished condition of the walls and roof and of the arrival of part of the marble in America, and of the readiness of the plaintiff to begin the setting of the same, and urged them to complete the walls and roof, but no reply was ever received from them.

The foundation up to the main floor level of the chapel was built by the architects either in the early spring of 1896 or in 1895, and *no more work was done by the architects until they started to carry up the walls in the spring of 1897.* (Heins' cross-examination, Rec., pp. 42, 50.) In June, 1897, the

walls, which were to be about 30 feet high, were up about from 10 to 12 feet, or possibly 15 feet. (Heins' cross-examination, Rec., p. 42.)

Had the walls been up and the roof on in June, 1896, the plaintiff, who was ready to proceed, could have completed his part of the contract within two or three months and before October 1, 1896. This unfinished condition of the walls and roof continued, and the plaintiff, in the spring of 1897, sent his brother, Coriolano, to America to urge upon the architects and the defendant the necessity of completing the walls and roof in order that the plaintiff might complete his part of the contract. The delays had already caused him much damage, prevented him from taking other orders, and had resulted in the loss of clients; and finally compelled the plaintiff to sell out his business. Coriolano Fontana arrived in America on June 10, 1897, and immediately went to see the architects and informed them of the condition of the walls and roof of the chapel, and told them that the chapel was not ready to receive the marble and begged them to hasten the completion of the walls and roof so that he could begin the setting of the marble. The architects told him that the chapel was not ready to receive the marble, but asked him to put up part of the marble first, and afterwards they would go on with the walls and roof. (Rec., p. 23.) He refused to carry on the marble-work until the chapel was under roof, as the contract provided. He protested against setting his marble before the walls were up to the height required according to the plans and specifications and before the roof was on. He declared to the architects that the marble-work was too delicate to be exposed to weather. Then the architects requested him to go on with the work as Father Lee had a lot of work to give him if he pleased him. Coriolano Fontana told them he would go to Washington and see what could be done. He came to Washington on June 11, 1897, and on his arrival here examined the chapel and found the walls were up only

22 feet, and the chapel was not closed in and the roof not on, and the floor was 2 inches too high for the marble work according to the plans. He at once notified the architects that he could not go on with the work in the present state of the chapel. One of the architects, in response to his notice, came to Washington and again requested Fontana to go on with the work, asking him to make the risers 1 inch each higher, to overcome the error in the height of the floor ; he told the architects he would do his best to go on with the marble-work and commenced it because the architects requested him so to do. He put up the pedestals under the arch at the opening into the church and about 21 feet lineal of wainscoting ; but he stopped work because of several thunder storms, wherein the rain, beating on the walls, came down on the marble-work, staining it and softening the plaster in which the columns that held the marble-work in place were imbedded, thus loosening the marble from the fastenings. He again notified the architects that it was impossible for him to go on until the walls were up and the roof on, as the contract and specifications provided, and again urged them to complete the walls and roof in order that he might go on with the completion of the marble-work. He endeavored to see the defendant or her attorney, but was informed that they were both absent in Europe. He testified that he saw Mr. George E. Hamilton, the defendant's attorney, immediately after the latter's return from Europe, at the end of July, 1897, and told him of the condition of the chapel and asked him to try and hasten the work, and that Mr. Hamilton told witness he could do nothing and did not know where Miss Carroll was, but that he would try and get her address and communicate with her. Fontana told Mr. Hamilton that he was under heavy expense on account of the delay, and that Mr. Hamilton replied, " Don't be afraid, all your expenses will be paid."

Coriolano Fontana saw the defendant at Coney Island at

the end of August, 1897, informed her of the delay, told her of the condition of the chapel, and asked her to hurry the work on the walls and roof, which work had already commenced, but was going very slowly. *The defendant told him she had nothing to do with the brick-work or with the building of the walls and roof, declined all liability for the delay, and advised Fontana to go back to Italy and wait there until the chapel was ready for the marble-work;* but Fontana told her there was no use of his going back to Italy because his brother's capital was all sunk in this job, and he would have nothing whatever to do if he went, because his brother had been obliged, under the circumstances, to refuse other offers. After this visit and conversation with the defendant, Fontana returned to Washington and was compelled to wait around until the walls were up and the roof partially on. The work of building up the walls of the chapel to the required height was begun in July or August, 1897, and as soon as the walls were up the work of putting on the roof was begun and was completed in the autumn of 1897. (Heins' cross-examination, Rec., p. 42.) Fontana commenced the setting of the marble-work on the 18th day of October, 1897, and it was not possible for him to commence earlier. At the time he began for the second time to set the marble-work, the roof was not wholly completed. When he began the setting of the marble in October he found that the marble previously set by him was stained and loosened from the walls, and that the plaster between the walls was rotten, and he was compelled to take it all down.

The plaintiff was further delayed for about two months on account of the failure to put up the framework for the ceiling. He notified the architects several times in October, November, and December, 1897, and in January, 1898, of the delay in putting up the framework for the decorative ceiling; but he did not receive the diagram of drawings of the decorative ceiling until early in February, 1898. That plaintiff's

part of the contract, according to the plans and specifications, was completed on the 15th day of March, 1898. It was further shown in evidence that marble can be more easily set in warm than in cold weather, and that drippings of mortar and cement on marble and rain water filtering in the walls where there is lime and cement, stains the marble and corrodes the polish, and the water weakens the fastenings with which the marble is attached to the walls, affecting the solidity of the work. The proof submitted by the plaintiff showed that his workmen were delayed for about 150 days after arriving in America before they could begin setting the marble, in consequence of the delay in completing the walls and roof, and in consequence of the delay the plaintiff was compelled and did pay the sum of twenty-eight hundred and fifty dollars (\$2,850) to the workmen sent to America by him, and he was further compelled to pay the sum of \$339.10 for extra storage and the sum of \$144 for extra cartage. He also lost the use of the deferred payment of \$18,500 for six months. The delay caused the plaintiff's ruin.

The architect testified that the plaintiff could have begun his work in the early spring of 1897 and that he directed him to do so, and that he told Fontana there was no reason why he should not go on; but Fontana said he could not go on with his work because the walls were not up and the roof was not on as the contract provided, and that the rain would spoil his work; that Fontana started to do some of the work and afterwards stopped and that witness could never get a satisfactory reply as to his reason for stopping, but that Fontana said something about the work that he had done having been damaged in some way; that witness notified Fontana in writing to proceed with the work, but that he refused to go ahead until the walls were up and the roof on, as the contract provided. After Fontana's refusal to go ahead with the work, witness started the carrying up of the walls to the height required by the contract and also the putting on of the roof.

Defendant further introduced evidence to show that the marble-work could have been done without the roof being on, provided the contractor had protected his marble, and that he could have protected his work by wrapping it with burlap and excelsior, and boxing it in, or by putting up a temporary roof over his work, or by putting over it a canvas roof; but the setting up of the marble in this way would be more expensive than if the roof was on; and that with this protection the contractor could have proceeded fairly safely, but "*there are always chances of accidents happening wherever you put up constructive work*" (Rec., p. 59); that had Fontana gone to work before the roof was on his marble might have been stained, and it might have been broken, unless the marble was protected. The architect told Coriolano Fontana verbally that he "would allow him the difference between the protection which he would have to put on the marble work if the roof were put on, as compared with what it would have to be if he went on without the roof" (Rec., p. 37); but that the reparation or the indemnity that was offered plaintiff's brother by the architect was not satisfactory (Rec., p. 58); and that Fontana refused to go on with his marble work because the roof was not on and because the rain would spoil his work; and for the reason the work he had already done had been damaged in some way. (Rec., p. 37.) *The architect admitted that the direction given by him to Fontana to go on with his marble work before the walls were up and the roof on was not in accordance with the original drawings and specifications; and "was not according to the original intention," and that there was nothing in the drawings or specifications to indicate that the work should be carried on in the way the architect directed.* The architect had never notified the plaintiff that he had changed the original drawings and wanted the two walls to go up together and be bonded together; but that he notified de Vecchi. (Rec., p. 45.)

At the close of the testimony submitted by both the plain-

tiff and the defendant, the defendant prayed the Court to instruct the jury, as follows: "The jury are instructed that under the pleadings and all the evidence in this case, the plaintiff is not entitled to recover." The Court granted the prayer of the defendant and a verdict by direction of the Court was returned in favor of the defendant; and from the judgment on the verdict so returned plaintiff appeals to this Court.

ASSIGNMENT OF ERRORS.

1. The Court below erred in directing the jury, under the pleadings and all the evidence in this case, to return a verdict for the defendant.

2. The Court below erred in holding, as a matter of law that the architect had the power under the contract sued on, and also by virtue of his employment as such, to change the express provisions of the contract against the protest and without the consent of the contractor in directing the contractor to go ahead with the setting of the marble before the walls were up and the roof on.

3. The Court below erred in admitting, under the pleadings in this cause, parol testimony to vary, add to, or modify the terms and provisions of the written contract under seal.

POINTS OF FACT AND LAW.

1. The Court below erred in directing the jury, under the pleadings and all the evidence in this case, to return a verdict for the defendant.

Under the contract under seal in this case the plaintiff undertook and agreed to provide all the materials and perform all the work mentioned in the drawings and specifications of said architect "for the interior marble finish of the Chapel of St. Anthony of Padua in the Church of St. Matthew, Washington, including the ceiling of decorative plaster

work and three windows of transparent alabaster all set up in place complete." The work included an altar, pavement, columns, bases, and capitals, wainscoting, arches, etc., "quite elaborately carved, some parts of it highly polished, a very fine, artistic class of work." (P. 22 and Heins' test., p. 46.)

The specifications expressly provide that "*the outside walls will be built, rough concrete floor finished and the chapel roofed in when the contractor commences to set the marble work.*" (Rec., p. 13.)

This is a clear, precise, and unqualified direction and agreement as to when the plaintiff should begin to set his marble-work. The provision was inserted for the benefit of the contractor, and it forms an essential part of the contract. Without such a provision he would not have undertaken to do the work. The work was to be of the most artistic, delicate nature. It was "to conform to the style and character of the carving in the Church of Sta. Maria dei Miracoli, in Venice" (Rec., p. 14), and the marble was to be similar to that in the world-renowned chapel of St. Anthony in Padua. Anyone who has seen the exquisite marble traceries in the former church can realize what care must be necessary to guard like carvings from injury while they are being set. It is for this reason that the contract and specifications are full of many provisions, inserted for the benefit of the owner, concerning the quality of the material, the details of workmanship, and the care which the contractor had to assume in order to turn over his work to the owner in perfect condition. Some of these provisions are as follows :

"All materials of every kind and description are to be of the very best quality ; samples must be furnished the architects when required, and all materials furnished must be equal to sample. All work necessary for the complete finish of the buildings as shown by the drawings, *and as directed by the specification* is to be executed in the most thorough, substantial, neat, and workmanlike

manner, to the entire satisfaction and written acceptance of the architects." (Rec., p. 11.)

"The carved panels and surrounding mouldings of the pedestals are to be in one piece. Each of the round columns is to be a monolith, with apophyge and fillet at top and bottom. * * * The pilasters are to be in one piece in their height." (Rec., p. 12.)

"All exposed surfaces (except floor and carvings) are to be brought to a very lustrous, clear, and even polish. Before polishing, the slabs and mouldings are to be taken out of winding and then brought to an even surface, so that when set side by side they will make a fair and even surface and all mouldings will properly intersect and will require no rubbing down at the joints. In polishing, no acid or other chemical, or wax is to be used. When the work is inspected on its arrival at the building this will be specially tested and all pieces found to be improperly polished must be replaced by suitable pieces or repolished in a proper manner as the architects may direct." (Rec., p. 12.)

"All mouldings must be cut sharply and accurately to profile and to line; they must be polished as highly as the slab-work.

"Particular care is to be taken at angles and at jointings that adjoining pieces shall be of exactly the same section. No rubbing is to be done at the joints." (Rec., p. 12.)

"All the marble-work is to be cleaned twice, once upon the completion of the work as it progresses and a second time after the entire work is set in place as will be directed by the architects. *All the work will be at this contractor's risk and he will be held responsible for any stains, spots, or marks in floors, piers, or walls.*" (Rec., p. 13.)

"All edges and corners must be intact and true. Pieces with cracks, rough edges, imperfect or chipped corners or edges will not be accepted. *The contractor must exercise the necessary care and diligence against breakage or injury by staining, spotting, or other cause.*" (Rec., p. 13.)

"The owner will have built a fence 8 feet high of boards enclosing the chapel with a door with padlock in same and will turn over the whole of the chapel into the care of the contractor *who must assume entire charge and responsibility for all his work and materials inside.*

"Any materials stored outside must be protected and looked after by the contractor at his own risk. The owner does not undertake any responsibility in the matter." (Rec., p. 13.)

"*As the details of the carvings are to be quite elaborate,* the contractor must before proceeding with the carving, make working models of the same and send photographs of these models to the architects. The architects and the owner will pass upon these and the models must be made acceptable to the architects and the owner before they are executed. All the capitals are to be slightly varied one from the other, but the general outline is to be alike in all.

"The carving is to be done throughout with artistic spirit and finish. The backgrounds are to be carved to a smoothly tooled undulating surface and is to conform to the style and character of the carving in the Church of Sta. Maria dei Miracoli, Venice." (Rec., p. 14.)

"Any work made without or not in strict conformity with detail drawings, or differing from the requirements of the drawings and specifications, or defaced or injured through negligence of the contractor or his employees, will be rejected, and must be removed, and satisfactory work and material substituted therefor without delay; *and all other work injured, defaced, or destroyed thereby must be made good by the contractor in default.* Should the contractor neglect or refuse to comply, the owner, or the architects acting for the owner, shall have the right after three days' written notice to contractor, of employing other parties to make good the work so rejected, injured, defaced, or destroyed, and at the contractor's expense." (Rec., pp. 15, 16.)

"The contractor is at his own expense to amend and make good any defects or faults in his work arising from defective or improper materials or workmanship, which

may appear within twelve months after the entire completion of his work." (Rec., p. 16.)

After reading all these provisions, wherein the contractor is made to assume and did assume the entire and strictest degree of responsibility for any damage to his elaborately carved work, whether from breakage, staining, marking, spotting, defects, or from "*any other cause*," can it be wondered that, for *his* protection, he caused to be inserted in the specifications the provision to the effect that "the outside walls will be built, the rough concrete floor finished, and the chapel roofed in, when the contractor commences to set his marble-work?" The plaintiff was an expert in chiseling in stone; he had been carving Carrara marble all his life, and he knew it would be folly for him to enter into a contract wherein he was to assume such wide responsibility for damage, without inserting in the contract a provision whereby his delicate marbles should be protected. Had not the contract contained some clause which in a measure would protect him from damage, he never would have undertaken the work. This provision of the contract was not one of the ordinary printed clauses, such as are found in ordinary contracts. It was carefully and specially inserted, and the reason for the insertion is evident. *The provision was a fundamental part of the contract*, relied upon by the contractor for his own protection, and it could not be nullified by the architects, because, by reason of their own negligence or that of their employers, they had failed to have the chapel walls and roof ready, as provided. The parties saw fit to embody this clause in the contract as an essential part of it, and the law presumes that they understood the import of their own contract, and that they entered into it with knowledge of their mutual rights and obligations.

It requires nothing more than the exercise of ordinary common sense to reach the conclusion that the contractor had meant to provide, and did provide, distinctly, that the walls

and the roof should be completed before the setting of his delicate work should begin, and that he never would have entered into the contract without such provision. The owner surrounded herself with every precaution, expressed in the most clear and precise terms, to insure the delivery to her of a perfect piece of work, and having done so, afterwards attempts to nullify the contractor's only safeguard—a clause expressed in terms equally precise and clear.

The architects themselves are forced to admit that while the work could have proceeded "fairly safely" without the roof being on, nevertheless, "of course there are always chances of accidents happening whenever you put up constructive work" (Rec., p. 59); and again, "there would be some danger, not a great deal—it would depend upon the carefulness of the contractor who was setting the iron beams." (Rec., p. 60.)

Referring to the setting of the marble before the walls and roof were completed, the architect, Mr. Heins, testifies as follows:

Q. "I am asking you about putting on of this roof, and whether if a piece of tile had fallen down, it would not be likely to damage?" A. "It was not likely to damage Mr. Fontana any."

Q. "Was it not likely to damage the marble?" A. "It might, and if it were not protected, it certainly would."

Q. "That condition was not originally contemplated when the drawings were submitted to Mr. Fontana?"

A. "It was not originally contemplated."

Q. "Was there any danger of bricks falling from these walls while they were going up?" A. "Yes." (Page 46.)

The architect himself thus admits that there was danger of bricks falling while the walls were going up.

Coriolano Fontana says:

"In putting up the permanent roof they would have completely spoiled my work." (Rec., p. 28.)

As a matter of fact the testimony shows exactly what did happen while the walls and roof were being put up in the fall of 1897. Fontana, anxious to begin his work, knowing that his brother was being ruined by the delay, attempted to set some marble before the chapel was fully closed in.

Mr. Belt, the bricklayer, testified that Fontana

“Had to leave the work. Yes, sir ; because the stuff was coming down on him so, that he could not stay underneath there.”

Q. “What stuff?” A. “Materials such as the laborers dumping bricks, and we were cutting the bricks and the like up there, and he could not stay there and work. He was directly underneath our scaffold, and it was impossible for him to work.” (Rec., p. 31.)

If a single brick had fallen upon one of the panels or pedestals, it would certainly have chipped the delicate carving, and the whole pedestal or panel (they were each of a single piece) would, under the terms of the contract, have had to be replaced by the contractor. A small dent made by a tile in one of the monolithic columns would have necessitated a new column. If a single spot or stain, caused by falling mortar, had appeared upon a piece of marble, the whole piece would have been condemned by the owner because “*all the work will be at the contractor's risk, who will be held responsible for any stains, spots, or marks.*”

If a single brick, or tile, or bit of mortar was likely to cause such damage, who can tell what irreparable injury would have been done to the completed work under conditions so graphically described by Mr. Belt—when “the stuff was coming down so that he could not stay underneath?”

Furthermore, apart from the injury that would certainly have been done to the marble during construction, exposure to the elements would have damaged the work beyond repair. Coliolano Fontana says : “The marble-work was too delicate to be exposed to the weather.” (Rec., p. 23.) This opinion

and the foresight of the plaintiff in having the clause under discussion inserted in the contract were fully justified by what actually happened. In order to please Father Lee, Fontana, while still protesting that the walls and roof should be on before he began his work, nevertheless tried to commence the setting of some marble. Before he had fairly begun several thunder storms suddenly broke upon his work, and the rain so injured the marble that it all had to be taken down. (Rec., pp. 23, 24.)

Can there be any wonder that Fontana, although half crazed at the delays, and seeing ruin staring him in the face, should have insisted and continued to insist that the terms of the contract should be carried out by the architects?

It is plain from the evidence that the contractor relied, from the beginning, upon this clause of the specifications. As soon as the contract was signed, he began work on the marble in order to have it ready within the time specified in the contract. In May, 1896, 75 cases of carved marble were forwarded from Italy and arrived in Washington in June. All the marble had been carved and was ready for shipment in June, 1896. The contractor was ready at that time to begin the setting, and could have completed his work within the time specified. In June, 1896, he was informed by his agent in Washington that the walls of the chapel were not ready to receive the marble in accordance with the plans and specifications. (Rec., p. 19.) Consequently he was forced to delay sending his workmen and the rest of the marble. He wrote at once, and many times thereafter, to his agent in Washington, ordering him to request the architects and the defendant to hurry the completion of the roof and walls in order that his marble might be set in place. (Rec., p. 19.) His agent wrote repeatedly, beginning in June, 1896, to the architects advising them of the unfinished condition of the chapel and urging them to proceed, as his principal was ready to put the marble in place. No reply, however, was had from them. (Rec., p.

19.) It is admitted by the architects that they received these letters complaining that the walls were not up and the roof not on. (Rec., p. 44.)

Finally, in May, 1897, nearly a year after all the marble was ready, the contractor, who, in spite of his continuous efforts, had been unable to get the architects to erect the walls, and who, owing to the fact that all his capital was tied up in this job, was on the verge of ruin, was forced to send over his brother Coriolano, together with the balance of the marble, in order to urge the owner to complete her part of the contract. Coriolano Fontana landed in the United States in June, 1897, and went at once to see the architects. They told him the chapel was not ready. They had begun to build the walls in the spring of 1897 (Rec., p. 42), but when Fontana arrived they were little more than half up, and work thereon had been stopped for some months. The architects, however, asked Fontana to put up a part of the marble first, adding that they would go on with the walls and roof. Fontana replied that the marble was too delicate to be thus exposed. They then requested Fontana to go on with his work in order to please Father Lee, who had a lot of work to give him if Fontana pleased him. (Rec., pp. 23, 43.) Fontana said he would see what could be done. He came to Washington and attempted to set some of the marble. He found it impossible to proceed, however, owing to heavy rain storms, which damaged his work. He thereupon notified the architects in writing as follows:

“I take the liberty to call your attention, as Miss Carroll’s architects, to the fact that it is impracticable for me to put up any of the work in said chapel, in its present incomplete condition, which I am required by said contract to do, and it is utterly impossible for me to complete said contract until the walls of said chapel shall have been completed and the chapel placed under roof.” (Rec., p. 16.)

It was on receipt of this letter, *and not till then*, that the

architects "discovered" that it would make "a better piece of work" to have the marble go up together before the walls were completed (Heins' letter of July 16, p. 17). They are forced to admit, however, on cross-examination, that such a mode of proceeding was not according to the plans and specifications (p. 45), and that it was not originally contemplated. (Page 46.)

Mr. Heins further testifies that "Fontana agreed to go on with the work *according to the change he (Heins) suggested.*" (Rec., p. 40.) Fontana positively denies that he agreed to go on. He simply told Mr. Heins that he would go to Washington and see what could be done, and, having seen, he found it impossible to do the work until the walls were completed as provided by the contract.

We submit that the evidence clearly shows that this direction of the architect to Fontana to proceed before the walls were up and the roof on was given solely as an excuse for the delay in the erection of the walls and roof.

Who caused the delay in the erection of the walls we do not know. The defendant admits that in August, 1897, when Fontana saw her, immediately upon her return from Europe, she told him that she could not help the delay, that she had no control whatever over the contractors who were building the walls; and she declined and disclaimed any liability or responsibility for the delay, and advised the witness to return to Italy *to wait until the chapel was in condition to put in the marble-work* (Rec., pp. 28, 33, 34), thus admitting that the marble-work could not proceed until the chapel was completed. When Fontana went to see the defendant's attorney, Mr. Hamilton, the latter "told him to go to Father Lee as *he* was the proper one to go to." (pp. 57-8.) As for the architects, entreaties and expostulations to them remained unanswered. The causes for the delay are unexplained, but the *responsibility* for the delay is fixed by the contract.

Article 8 provides as follows:

"The owner agrees to provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the contractor, agrees that he will reimburse the contractor for such loss."

The Court of Appeals has already decided in this case that the defendant

"Is the person referred to as 'owner' in the contract with plaintiff and as to him she assumed that relation for the special purpose of that contract. She took the place of the real owner, and, at least, became an absolute guarantor of the necessary construction preliminary to the commencement of plaintiff's work."

Fontana v. Robbins, 18 App., D. C., p. 418.

And referring to article 8, just cited, Mr. Justice Shepard, delivering the opinion, adds:

"*This is re-enforced* by the following clause of the specifications referred to in the contract: 'The outside walls will be built, rough concrete floor finished, and the chapel will be roofed in when the contractor commences to set the marble work.'" (Page 418.)

After the plaintiff had refused to follow the "directions" of the architects to proceed to put up the marble before the walls and roof were done, the architects began the work of erecting the walls and roof, and as soon as the plaintiff could proceed with his work in safety, he hurried the same to completion, working with a day and a night force the greater part of the time.

Uncontroverted evidence is further to the effect that, after the outside roof was on, and when Fontana was ready to do the decorative ceiling, he could not get the architects to put up the inside frame-work; and although he made frequent requests to be furnished with the diagram of the ceiling, the architects failed to do so, thus causing a further delay of about two months. For this delay no excuse whatever was

offered by the defendant or her architects, and no evidence introduced tends to controvert the proof submitted by the plaintiff.

Such was the testimony introduced in this case and the condition of the facts upon which the Court below directed a verdict in favor of the defendant. The Court below held, as a matter of law, that the architects had the right and power to direct the contractor to proceed before the walls were up and the roof on, and because of his failure and refusal to comply with this direction, the plaintiff was not entitled to recover for any damages he may have sustained in consequence of the delays on the part of the defendant in putting up the walls and roof; that this direction of the architect was, as a matter of law, a reasonable direction, and one that the contractor should have followed.

This opinion of the Court below was based upon the following clause of the contract :

“Article 3. No alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the architects, and when so made, the value of the work added or omitted shall be computed by the architects, and the amount so ascertained shall be added to or deducted from the contract price.” (Rec., pp. 7, 8.)

In the course of building, it occurs sometimes to add, and sometimes to desire that certain things may be omitted in the work shown on the plans and specifications in some minor particulars, and clauses of this nature are therefore usually inserted to give the architect power in this respect.

“The particular reasons for referring demands made by either party growing out of alterations, which the architects were empowered to direct, to what is called, in article 3, their award, do not exist in the case of demands in article 8. The former demands accrue as part and parcel of the work to be done in the performance of

the contract, in case of probable contingencies that might call for correction of the plans and specifications in some *minor particulars.*"

Fontana v. Robbins, 18 D. C. App., 417.

It is clear that article 3 (which is part of the formal *printed* "uniform" contract) refers only to the *alterations in the work* shown or described by the drawings and specifications; that is, to *added or omitted work*, because said article further provides that "the value of the work *added or omitted* shall be computed by the architects, and the amount so ascertained shall be added or deducted from the contract price, etc." Under this clause the architect could have omitted some part of the marble-work or have added some other marble-work found necessary, provided directions in writing to that effect had been given by them to the contractor.

To provide for probable contingencies that might call for corrections of the plans and specifications in some minor particulars only, is the reason for inserting clauses of this nature in building contracts, for without such clauses the architect is without power to make alterations in the plans and specifications and bind his employer thereby, or to make *any* change in the original contract.

"An architect superintending the direction of a building has no authority generally to make alterations in the plans and specifications and bind his employer for extra work, or to make any change in the original contract."

American and English Enc. of Law, 2d Ed., Vol. 2, p. 820, and cases referred to in Note 5.

The duties and powers of an architect are such only as are conferred upon him by the contract between the parties. His duties are to see that the work is performed and the materials supplied as provided in, and in accordance with, the plans and specifications. He cannot change, modify, or alter the contract unless special provision to this effect is inserted in the

contract. His employment is one which simply gives him power as the representative of his employer to see that the contract as made is performed and not violated.

In a Massachusetts case the Court says :

“ The provision of article 1. of the contract, that ‘ the contractor, under the direction and to the satisfaction of F. M. Churchill, architect, acting for the purposes of this contract, as agent of the owner, shall and will provide all the material and perform all the work mentioned in the specifications and shown on the drawings,’ does not go further than to make the architect the agent of the owner in the matter of deciding whether the work done fulfilled the requirements of the specifications and drawings. *Apart from an agreement to that effect, an architect is not the general agent of the owner.*”

Leverone v. Arancio (Mass.), 61 N. E. Rep., 46.

“ Where a contract is entered into for the erection of a building according to plans and specifications, under the supervision of a specified architect, the architect cannot change the terms of the agreement unless specially authorized so to do.

* * * * *

“ ‘ If the jury believe from the evidence that the plaintiff has completed the work according to contract (except as to changes which were made by authority of the defendant), to the satisfaction of the architect or his assistant, then the plaintiff is entitled to recover the balance of the contract price yet unpaid, with interest thereon from the time of the completion of the work, at the rate of 6 per cent. per annum.’ ”

“ This instruction is erroneous, as it seems to assume there were changes made by authority of appellant. Even if there had been evidence tending to prove that appellant had authorized the changes, *it would have been a question for the jury.* We find no evidence in this case that appellant ever authorized the changes which seem to have been made. The architect had no such authority under the contract. His duty was to see that the contract was faithfully fulfilled according to the

agreement of the parties. Appellant had the right to insist upon the strict compliance with the agreement, and, unless specially authorized, the architect could not change its terms. If he might to the extent claimed in this case, he might as to any and every part of the terms, specifications, and conditions."

Adlard v. Muldoon, 45 Ill., 194.

In the case of *Burke v. the City of Kansas*, 34 Missouri Appeal, 570, the contractor agreed "to do and complete said work * * * according to such directions as the city engineer, may, from time to time, give in superintending the construction of the work, and according to the plans and specifications on file in the office of said city engineer prepared for the letting of the contract for such work." The Court in deciding against the contractor for extra work claimed to have been done by direction of the engineer, says :

"How far shall the contractor go in following the directions of the city engineer? Was the plaintiff in duty bound to pursue the instructions of the city engineer, even though in so doing he depart from the plans and specifications, which he contracted to carry out? *We think not.* It is a well known rule that in the construction of any written contract, it should be so construed as to harmonize, if possible, in all its provisions and so as to avoid all conflicts.

"The undertaking of the plaintiff in this contract was that he would construct the sewer as *stipulated in the plans and specifications.*

"The plans and specifications were to be followed just as zealously as if incorporated in the body of the agreement. Those plans and specifications provided the depth at which the sewer should be placed, just as they provided for the size of the pipes to be used.

"If then the engineer could depart from the terms of the contract as to the depth of the sewer, why could he not substitute a smaller for a larger sewer-pipe, permit, for an example, a twelve-inch for an eighteen-inch sewer-pipe, when the contract required the larger? This would

admit the power in the engineer, while merely superintending the construction of the work, to change, or modify the contract. This the engineer cannot do. And as he cannot change or modify the contract as to the one stipulation therein relating as to the size of the pipe used, it follows that he cannot change its terms as to the depth at which it shall be placed.

“ ‘According to such directions, therefore, as the city engineer may from time to time give in superintending the construction of the work’ should be construed to mean such directions that he may give looking to a completion of the work *according to the plans and specifications*, and not to mean that the engineer may give directions for an improvement in manner *different* from that provided in the plans and specifications. It is made the duty of the engineer under the contract to see that the contract is *complied* with, not *violated*. ”

See also *McIntosh v. Hastings*, 156 Mass., 344.

Bonstell v. Mayor, &c., of N. Y., 22 N. Y., 162.

Glacius v. Black, 50 N. Y., 145.

Genovese v. Mayor, of N. Y., 55 N. Y., Sup., 397.

Rex v. Peto, 1 Y. & J., 52.

Clauses similar to article 3, which clothe the architect with power to alter the plans and specifications in minor particulars only, as to added or omitted work, are inserted *for the protection of the owner*, in order to provide against claims by contractors for extra work done under oral directions. And the Courts have uniformly held, where building contracts contain such clauses, that the same must be strictly complied with or there can be no recovery.

“ The written contract carefully provides that any additions to or deviations from the plans and specifications shall be directed in writing by the committee or architect, and that ‘it is expressly agreed that no alterations or additions are to be paid for unless so directed in writing.’ No evidence was offered, or any waiver of this provision by the defendant, or any authority in the architect to waive it. *This clause was intended to protect the*

defendant against claims of extra work under alleged oral directions or contracts."

Stewart v. Cambridge, 125 Mass., 109.

See also Balto. Cemetery Co. v. Coburn, 7 Md., 206, &c.

Woodruff v. Roch & Pitts. R. R. Co., 108 N. Y., 47, etc.

Rex v. Peto, 1 Y. & J., 52.

That article 3 of the contract clothed and was intended to clothe the architect *only with power to alter the plans and specifications as to added or omitted work in some minor particulars*, is further strengthened by the fact that article 2 of the contract provides that :

"The architects shall furnish to the contractor such further drawings or explanations as may be necessary to *detail and illustrate* the work to be done, and *the contractor shall conform to the same as part of this so far as they may be consistent with the original drawings and specifications* referred to and identified, as provided in article 1, etc."

The parties having agreed that the setting of the marble should not begin until the walls and roof were completed it became and was the duty of the architect to see that the contract in this respect was complied with, and not to endeavor to have the same violated to the injury of the marble and the damage of the plaintiff. The parties having agreed upon this provision, and clearly expressed themselves as to their meaning, they must be bound by the language employed. And neither can change, alter, or modify the same without the consent of the other; and without special powers conferred upon him to do so, the architect, superintending the completion of the work, cannot change the contract in any particular.

The Court below erred in admitting, under the pleas in this cause, parol testimony to vary, add to, or modify the terms and provisions of the written contract under seal.

The single plea of the defendant denied causing delay to the plaintiff and alleged full performance on her part including the full payment of the price stipulated. And the only provision in the contract sued on which provides for alterations (alterations only in regard to added or omitted work) is found in article 3 (Rec., p. 7), which clothed the architects with power to direct *in writing alterations for any added or omitted work* called for by the plans and specifications.

This clause, therefore, expressly limits the architect as to the manner and character of the alterations he can make under the terms of the contract on behalf of the owner. The contractor is expressly notified that only for such alterations, directed in the manner provided in article 3, shall the contract price of \$28,500 be increased as against the owner, or decreased as against the contractor.

The Court below permitted the defendant to introduce testimony attempting to show a verbal understanding between the owner and her agents, the architects, which antedated the written contract under seal (Rec., pp. 34, 35), and which attempted to clothe the architects, by virtue of such verbal understanding, with additional powers other than were given by the contract sued on. This was to admit testimony to alter, add to, and vary the terms of a written sealed instrument. It is elementary law that this cannot be done; and it is needless therefore to cite authorities on this point. The case of *Newman against Baker*, 10 App. D. C., 187, is sufficient authority on this point. Certainly, under the plea of performance, which is a special plea, the defendant was not entitled, without notice to the plaintiff, to introduce evidence which tended to set up a contract between the parties different from the one sued on. While the evidence introduced by the defendant tends to show that there was a verbal arrangement between her and her architect, Heins, which gave the architect greater powers than were conferred upon him in the contract, yet she never gave or attempted to give notice to the plaintiff that the architect

possessed authority and power other than was conferred upon him by the written contract under seal. The only notice of such an arrangement attempted to be shown as having been given to the contractor, was in an interview which took place at the office of Mr. George E. Hamilton, before the signing of the contract sued on, at which time the defendant "distinctly stated that she would not have anything to do with the details," and so informed Mr. Hamilton. (Rec., p. 52.) After this interview the contract was prepared by the defendant or her agents and sent to Italy for the approval and signature of the plaintiff. After the signing of the contract neither the defendant nor her agents ever attempted to give notice to the plaintiff to the effect that the defendant had clothed the architect, either before or after the signing thereof, with greater powers than were conferred by the contract; but, on the contrary, when the plaintiff's brother saw the defendant at Coney Island in the summer of 1897, and informed her of the condition of the walls and roof and his inability to proceed with the marble-work, and urged upon her the necessity of having the same completed, she informed the plaintiff's brother and agent that she had nothing to do with the walls and roof, declined all liability therefor, and advised and requested him to return to Italy and wait until the walls were up and the roof on. (Rec., pp. 34, 25.) In this interview defendant did not tell Coriolano Fontana to proceed with his marble-work before the walls were up and the roof on, but, on the contrary, advised him to go back to Italy, and wait until the walls were up. It is clear, therefore, that the defendant did not contemplate that the contractor should do his work in a manner different from that provided in the contract, or that the architect had power to direct him to go ahead in violation of it.

We therefore submit that even if it could be shown that the plaintiff was informed and knew that the architect had the powers claimed to have been given by the defendant in

the verbal arrangement referred to, yet, we submit, that the defendant should have in her pleas given notice to the plaintiff of this defence, so that he could have prepared himself to meet it at the trial.

CONCLUSION.

It was the legal duty of the defendant to keep the work in such a state of forwardness as to enable the plaintiff to perform his contract within the time limit ; and failing so to do the plaintiff was entitled to recover for such damages as he may have suffered in consequence thereof.

Nelson *v.* Pickwick Asso. Co., 30 Ill. App., 336.

See *v.* Partridge, 2 Duer., 462.

Tobey *v.* Price, 75 Ill., 646.

Abbott *v.* Gatch, 13 Md., 329.

Franchi *v.* Brunswick-Balke Collender Co., 13 N. Y. Supp., 294.

It was therefore the legal duty of the defendant under the contract to erect the walls and roof so as to enable the plaintiff to complete his work. She failed so to do, and for such failure the plaintiff is entitled to recover such damage as he may have suffered in consequence thereof.

It is respectfully submitted that the Court below erred in holding that the architect had the power (in violation of the plain and express provisions of the contract, and against the protest and consent of the plaintiff) to direct the plaintiff to proceed before the walls were up and the roof on ; and erred in directing the verdict in favor of the defendant.

The judgment rendered on said verdict should, therefore, be reversed by this Court and a new trial granted.

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Attorney for Appellant.

Court of Appeals, District of Columbia.

APRIL TERM, 1903.

No. 1287.

PRIMO FONTANA, APPELLANT,

vs.

MARY HELEN CARROLL ROBBINS.

BRIEF ON BEHALF OF APPELLEE.

G. E. HAMILTON,

M. J. COLBERT,

For Appellee.

Court of Appeals, District of Columbia

APRIL TERM, 1903.

No. 1287.

PRIMO FONTANA, APPELLANT,

vs.

MARY HELEN CARROLL ROBBINS.

BRIEF ON BEHALF OF APPELLEE.

I.

STATEMENT OF CASE.

This is the second time that this case has been before this court on appeal. The former decision of this court is reported in 18 App. D. C., 417. At the first trial the court below directed a verdict for the defendant at the close of the plaintiff's testimony, and at the second trial the court directed a verdict for the defendant at the close of all the evidence for the reasons hereinafter stated. The declaration charges that the appellee and the appellant entered into a contract by which Fontana undertook to execute the interior marble-work of a chapel in St. Matthew's church, in the city

of Washington, including the ceiling of plaster-work and certain windows, in accordance with drawings and specifications prepared by Heins and La Farge, architects. The contract provided that no alterations should be made in the work contracted to be done by Fontana except upon the written order of the architects, and when so made that the value of the work added or omitted should be ascertained, and the amount thus ascertained added to or deducted from the contract price. The contract (article 8) further provided that the "owner" should provide all labor and materials not included in the contract, so as not to delay the progress of Fontana's work, and in the event of failure so to do, thereby causing loss to the contractor, that the owner would make good such loss. Under the decision of this court in 18 App. D. C., 417, the proper construction of this clause in the contract required the defendant to be considered as the "owner" for the purposes of the contract.

Articles 3 and 8 seem to be the only parts of the contract material upon the questions raised on this appeal.

The specifications provided (Rec., p. 13) that "the outside walls will be built, rough concrete floor finished, and the chapel will be roofed in when contractor commences to set the marble-work. All brick-work supported on the columns of the chapel will be done by owner's brick-masons at such times and in such manner as the contractor may require." The other provisions in the specifications are set out at length in the record, and need not be adverted to. The contract, however, provided that the contractor (Fontana) should execute his work under the direction and to the satisfaction of the architects (Rec., p. 7). The defendant pleaded performance, and upon the single issue thus raised the case went to trial. On July 13, 1897, Fontana's agent wrote to the architects, complaining that the walls of the chapel should have been completed and the roof put on before he should be obliged to commence work. A few days later (Rec., p. 17) the architects informed Mr. Fontana that he

could go on with his work without waiting for the roof, and directing him to proceed at once with his work. Under this direction Fontana did proceed with his work and made no further complaint until December 9, 1897, when he called for plans for the ceiling, and again on December 31, 1897, when Fontana called upon the architects to put the framework of the ceiling in position.

The plaintiff himself was never in this country, and his deposition was taken under a commission sent to Italy. He had necessarily no personal knowledge of the matters in dispute. He stated that he shipped some of his marble to America in May, 1896, and that the balance of the marble was ready for shipment in June, 1896, but was not actually shipped until 1897.

Coriolano Fontana testified that he came to America to execute the contract in 1897, and that on June 10 of that year he asked the architects to finish the walls and roof of the chapel, but that work on the walls was not commenced until July, 1897, although the walls were 22 feet high when he arrived in this country. Immediately upon his arrival here he was notified by the architects to proceed with his work without waiting for the completion of the walls and roof, and witness seemingly acquiesced in this direction (Rec., p. 23), and actually came to Washington to commence his work. Heins, the architect, then came to Washington and again directed witness to proceed with his work. Fontana refused to do so, giving as a reason therefor that the marble-work would be stained or damaged if it was put in without the roof being on. On page 28 of the record the witness stated that he did not consider the matter of erecting a temporary roof because he stood upon the terms of his contract, which provided that the roof should be on before he commenced work. He again reiterates that the only reason he could not have done his work before the roof was on was because the contract did not so provide (Rec., p. 28). The only other complaint made

was that he was delayed for some time in getting detailed drawings for the ceiling (Rec., p. 29).

This was substantially all the testimony offered by the plaintiff which had any bearing upon the issues involved in the case. On the other hand, on behalf of the defendant, Mr. Heins testified that under the contract Fontana should have completed his work on October 1, 1896, but that at that time Fontana did not have his marble ready. The marble did not arrive until the spring of 1897, at which time the walls were partially up (Rec., p. 36). Heins further stated that as soon as Coriolano Fontana arrived in this country he instructed him to go ahead with his work, and that there was no reason why he should not have commenced, and that, in fact, he agreed to do so. Afterwards he discontinued work, alleging as a reason therefor that the rain would spoil his marble; but the architect told him that it was very easy to protect his work by covering it with boards or canvas or weather-proof paper; but he refused to go on until the roof was on. In the meantime (Rec., p. 37) Heins informed him that he would pay him any additional expense to which he might be put by constructing his work before the roof was on, and again Fontana agreed to go on. Heins further stated that in February, 1897, he informed the plaintiff's agent that he should commence his work without waiting for the roof. The reason the roof was not put on was because Fontana, under a separate contract with the church authorities, was furnishing the columns which supported the roof, and the columns did not arrive until the winter of 1896.

Mr. Hamilton testifies that Fontana told him that Heins had ordered him to go ahead with his work without waiting for the roof, and that Fontana would be paid any damages that he might incur, but that Fontana refused to assent to this arrangement because he did not want his work stained (Rec., p. 54).

Mr. Taylor, supervising architect of the Treasury, testified

that it was entirely feasible for Fontana to have completed his work without waiting for the roof to be put on.

This was substantially all the evidence in the case, and at the close of the evidence the court directed the jury to return a verdict for the defendant.

II.

ARGUMENT.

It will be observed that the declaration contains no claim for any damage because of the failure of the architects to furnish detailed drawings for the ceiling or to erect the framework of the ceiling, nor is there any claim of that sort made in the bill of particulars filed with the declaration. The sole claim is that under the terms of the contract Fontana was not obliged to commence work until the roof was on, and that the architect had no power or authority to vary the order or time in which the plaintiff should commence his work. There is another assignment of error made to the effect that testimony was admitted to vary or modify the terms of the sealed instrument sued on.

1.

As to the power of the architects to direct Fontana to proceed with his work before the roof was on, in modification of the contract.

As a part of our argument upon this proposition we quote the opinion of the learned chief justice who tried this case in the court below, which seems to us to be a very clear statement of the principle that should control the question. Judge Bingham said :

“ I am of the opinion that the provision in the contract to the effect that the marble-work should be commenced when

the walls were up and the roof on, is not such a material part of the contract as would prohibit its modification by the architects as to the manner of its execution. It is not a provision as to the structure itself, as to what kind of structure it was to be, or what the materials were that were to enter into the structure; but it simply relates to the order in which the marble-work shall be done with reference to the other work to be done in the building of the structure.

"It would therefore be competent, I think, for the architect to make a reasonable change of the contract, such a change as might be made and could be made without placing the contractor in unnecessary jeopardy, without putting him in such a position that, if he made some failure in regard to the matter, he could not recover damages, but it must be a reasonable request. As is shown by the evidence, it is perhaps a little questionable whether it would be a provision that ought to have been made and ought to be held to be within the power of the architect; but it seems to me that the only way of settling that matter fairly and equitably and justly between the parties, the only construction which might reasonably be presumed to have been within the contemplation of the parties when they put it in the contract, would be that the architect should have the right to change this provision of the contract, to modify it as he might any other, for the purpose of consummating the object of both parties and everybody connected with the contract, to wit, the putting up of a chapel which would be adorned in a certain manner provided by the contract itself and the specifications, unless it unnecessarily placed the plaintiff unreasonably in jeopardy as to his rights or his interest in some particular.

"If he had made the change according to the direction of the architect, and thereby accelerated the completion of the work, and could have protected the work which he had done, at any reasonable expense (which, by the way, under another provision of the contract is incurred by him in putting up the building), he would have a right to call upon the architect to state whatever that might be, whether it was in the contract or not; but I think, in analogy to what the contract does provide. At any rate, if the architect had made a change which caused it to be more expensive to the contractor to complete his work than it would have been to do it in the time and in the order that the contract called for,

the owner would unquestionably be liable for that increased expense.

"There is one other provision that ought not to be lost sight of, which, so far as the evidence is now before the court and jury, I do not understand to exactly settle that question; whether, if the order had been executed or its execution attempted by the contractor as the architect ordered, he could have safely proceeded and protected his work as the work went along, and prevented these injuries to his work which he seems to have suggested to the architect, either at the time or at some time afterwards, would be liable to be incurred by rains, dampness, cement, etc.

"The architect has testified this morning that he told the contractor that it could be done, and that it was a very common thing, and it might be done by putting on a temporary roof, or by putting up other protections for his work so that it would be preserved from injury; and of course it would be clearly within the right of the plaintiff to show that he could not have executed the order of the architect, and proceeded to put in the marble-work before the building of the walls and before the roof was on, if there was no temporary protection that would have been effective for that purpose. I think it would be entirely competent, if the testimony is admitted showing that if he had finished his work in a different way and at a different time and in a different order from what was specified in the contract, for him to show that there could have been no protection within reasonable cost, or possibly that it could not have been made more effective at all except by a permanent construction of the walls and the roof.

"That is a matter, of course, that we do not undertake to decide now. At present I only suggest that it seems to be probable, from the view I take of the case as far as it has progressed, that he might be allowed to show that, but I think the defendant may show what the architect did. As I am at present advised, it would not be in contravention of the contract and specifications that the defendant should be allowed to make that showing."

And again the court said at the close of all the evidence :

"It would seem that the defendant did not object to going on under the order of the architect because the order was

not reasonable and could not be executed but because it was not according to the contract. The contract provided that the roof should be on and the walls up and he believed that if he should go on and execute the order of the architect by putting up the marble-work before the walls were up and the roof on, that he would be responsible for all the consequences, notwithstanding it would be the result of the order of the architect. Even if the architect had not, as it appears from the evidence he did, assured him that he would be protected as to any damages that he might incur by reason of going on or for any expense that he might be put to on account of going on under such an order, he thought it better to ignore the order entirely and assume that the contract itself must be followed and to assume, furthermore, that he was under no obligation to comply with this order of the architect and that he would be without remedy if he should go on and should suffer injury.

"That I think is contrary to the law and contrary to the fact, so far as there is any fact about it. There is no fact about it so far as this issue is concerned, for the order is shown to be a lawful order such as an architect could make. That I held upon the argument yesterday, unless it could be shown by some proper evidence, exterior, that it was an unreasonable order and ought not to have been made or that it was so unreasonable as that it would be presumed not to be in contemplation of the parties at the time they drew up the contract and specifications. But that does not seem, from the evidence, to be the fact, and when we come to that conclusion we have disposed of every question of fact there is in this case. The fact of the plaintiff having been idle for a certain length of time, of his being put to expense by having an agent here and a man here who was brought over to assist in the work is shown, under such circumstances, to be the result of his own conduct. He refused to go on under the direction of the architect and unless he could go on in the way originally provided in the contract, which would be with the walls up and the roof on. There could be, in his estimation, no change made, and unless that condition of things was brought about he would not go on with his work. In doing that I think he assumed the responsibility, and it cannot be referred to any fault on the part of the defendant in this case. It is the result of his refusal to do anything until he could do it in exactly the way the origi-

nal contract provided, ignoring the order of the architect. There is where the whole trouble seems to have arisen.

"There is no question of fact, as I look at it now, to go to the jury to be determined by them. I am not much inclined to take the case from the jury and do it very reluctantly; but I am of the opinion, having settled the questions of law that have arisen in this case, to believe that if I am right in my conclusions about the law then this case should be taken from the jury, and this will be done."

Under the court's ruling that it would be competent for the plaintiff to show that the marble-work could not have been proceeded with with safety, no testimony of that nature was offered and none was attempted to be introduced, so that at the conclusion of all the evidence the only question was as to the reasonableness of the architect's direction, and the only testimony upon that subject was the testimony of the architects, Heins and Taylor, both of whom declared that under the changed conditions it was reasonable, practicable, and proper to do the work in the manner that Mr. Heins had ordered it to be done.

Primo Fontana in his deposition states that the only things that prevented the execution of his contract before the roof was on were "the danger of storms and the conditions of the contract and specifications."

Coriolano Fontana testified (Rec., p. 23) that "the marble was too delicate to be exposed to the weather;" that he started to do the work, but the rain-storms stained the marble and softened the plaster. When asked why he did not put a temporary roof over his work he stated (Rec., p. 28) that he did not look into that matter, because he stood upon his contract, and again on the same page he states that it was not possible for him to do the work as directed by the architect "under the terms of his contract." So that the proof is uncontradicted that Fontana could have done the work as directed by Mr. Heins, but that he preferred to stand on the terms of his contract, and denied the power of

the architects to change or vary the time for the commencement of his work as stated in the contract.

The appellant contends in his brief that an architect has no power generally to make alterations in the plans and specifications so as to bind his employer for extra work, or to make any changes in the original contract.

This we may concede to be so ; but we contend that if he is authorized to use his own discretion and judgment as to the means to reach a certain end, he may vary the terms of the contract.

"An employer may constitute the architect his agent generally for all purposes connected with the erection of the building, and in such case the architect may bind his employer for extra work and materials."

2 A. & E. Enc. Law (2d ed.), p. 821.

Robinson vs. Springfield Iron Co., 39 Hun., 634.

"The only proof in the record as to the extent of the authority of the architects is furnished by the defendant's proof. On page 34 Mrs. Robbins testified that Heins had full authority to look after everything and take charge of everything, because she didn't want to be bothered about details which she didn't know about. He had her full authority, to enter into any contract, and she was bound by any arrangement he made."

She further said :

"It was arranged between us that Mr. Heins should look after the work and see that it was done, and anything that he thought should be done about it should be done by his direction, and I would be responsible for any arrangement he made" (Rec., p. 35).

Heins himself testified (Rec., p. 41) that he had authority to direct the contractors when to begin and how to do their work, the order in which they should do it, when to start and when to stop, and there is absolutely no contradiction of this proof. So that it must be assumed that in

directing Fontana to proceed with his work before the roof was on, Heins had the complete authorization of his principal, and indeed Mr. Fontana never questioned the extent of Heins' authority when the order was given. Counsel for the appellant in his brief confuses the contract between Mrs. Robbins and her agent with the contract between Mrs. Robbins and Fontana. It was entirely competent to show the extent of Heins' authority, and such a showing did not in any degree vary or alter or add to the terms of the contract between Mrs. Robbins and Fontana.

In addition to this, the contract itself provided in article 3 that the architect should have the authority to make alterations in the work, and if such alterations required the contractor to do additional work he should receive additional compensation for it. The contractor himself agreed that he would perform any additional work or any alterations in the work that the architect might direct upon receiving proper compensation.

In this view of the case it is respectfully submitted that there is no merit in the claim of the appellant and that the judgment below should be affirmed.

G. E. HAMILTON,

M. J. COLBERT,

For Appellee.